Supreme Court, U. S.
FILED
SEP 12 1973
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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-5853 — 377-3721

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NO. _____

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 15, 1973.

The appendix below is hereinafter designated by the symbol "App."

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

The opinion and final judgment of the District Court is reported in 332 F.Supp. 1107 (S.D Fla.1971), and appears in the Appendix hereto.

The order adopting plan for providing for preliminary hearings is reported in 336 F.Supp. 490 (S.D.Fla.1972), and appears in the Appendix hereto as does the findings and conclusions relative the committing magistrate system of Dade County, Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 15, 1973, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person in state custody has a federally protected right to a preliminary hearing.

2. Whether a United States District Court judge has jurisdiction to interfere by declaratory and injunctive action with duly constituted state criminal proceedings on the question of preliminary hearings.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

2. Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Respondents Pugh and Henderson, joined subsequently by intervening Respondents Turner and Faulk, filed a class action in the United States District Court for the Southern District of Florida, seeking an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial

was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States (App. 29). Jurisdiction was founded upon 28 U.S.C. 1343(3) (4) and 42 U.S.C. 1983. The respondents asked the Court to mandatorily compel, via injunction, the petitioner, State Attorney Gerstein, among others, to grant such a hearing to respondents and members of their class and to declare that they were so entitled to such a hearing (App. 29).

On April 6, 1971, petitioner Gerstein filed his Answer and a Motion for Summary Judgment and in a memorandum of law in support thereof admitted as undisputed facts that:

> 1. The respondents were charged at said time with violations of the Florida Statutes.
>
> 2. They had been charged by Information as permitted by Article I, Section 15(a) of the Florida Constitution.
>
> 3. That prior to the filing of the Information, there was no preliminary hearing.
>
> 4. That the Informations were filed by petitioner Gerstein or by one of his duly appointed Assistant State Attorneys, under and by his authority.
>
> 5. It is the policy and practice of the petitioner Gerstein, his agents, servants and employees, to file Informations based on an independent examination of the facts, notwithstanding that there has been no preliminary hearing.

> 6. It is the policy and practice of the petitioner Gerstein, his agents, servants and employees, to resist any attempt to have preliminary hearings after an Information has been filed or an Indictment has been found (App. 84).

In an order and final judgment filed October 12, 1971, the District Court said:

> "The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause." (App. 44)

The court accordingly granted the sought after relief to respondents and further directed petitioner and other public officials who are not parties hereto to submit a plan of implementation (App. 46). Thereafter, a plan submitted by the Sheriff of Dade County, E. Wilson Purdy, was adopted by the court. Inter alia, the plan required expeditious preliminary hearings before a magistrate for all persons arrested, whether with or without warrant. Under the plan, those not given such hearings were to be released immediately. (App. 47-54).

The Purdy Plan was stayed by the Court of Appeals pending appeal. During this period the judiciary of Dade County and other members of the criminal justice system effectuated their own plan providing for preliminary hearings. Subsequent to oral argument in the Court of Appeals the stay was vacated and the District Court was directed to make specific findings of fact on the constitutional deficiencies, if any, as between the Purdy Plan and the plan

then in effect in Dade County. (See opinion of Court of Appeals,) (App.2). The District Court, after oral argument, made its findings, taking into consideration the Amended Rules of Criminal Procedure issued by the Florida Supreme Court on December 6, 1972, effective February 1, 1973, which provide for a committing magistrate system but which still permit a state attorney to file a direct Information without a subsequent determination of probable cause by a magistrate (App. 55-69). The District Court did not further implement the Purdy Plan and the stay, for all purposes, has remained in effect. (See order of dismissal in Scaldeferri et al. v. Dan Satin et al.,) (App. 83).

In its letter to all counsel of record written June 1, 1973, the Court of Appeals inter alia asked, "In summary, just what if anything is left of this appeal?" (App. 73) In its joint memorandum of response, counsel stated that the major abiding substantive legal issue which remained intact was:

> "DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?" (App. 75)

In upholding the District Court, the Court of Appeals held that reasons of comity did not bar the suit of petitioners and that, therefore, the court "need not decide whether this situation comprises an exception to *Younger*."

[*v. Harris*, 401 U.S. 37] (App. 9). The court thereupon held that the Fourth and Fourteenth Amendments require that arrestees held for trial on informations filed directly by the state attorney must, without unreasonable delay, be given a preliminary hearing before a judicial officer. (App. 9-10, 21). The Court of Appeals also held that misdemeanants were also entitled to preliminary hearings except where they are out on bond or charged with violating ordinances carrying no possibility of pre-trial incarceration (App. 25).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Erroneous In That It Holds That The Fourth And Fourteenth Amendments To The Constitution Of The United States Require A State To Provide Preliminary Hearings Before Judicial Officers For All Defendants Incarcerated Awaiting Trial Upon Informations Filed By A State Attorney And Thus Presents An Important Question Of Federal Constitutional Law And The Decision Conflicts With Applicable Florida Law And With The Decisions Of This Court And Of Other Courts Of Appeals.

Both at the District Court level and before the Court of Appeals, petitioner argued, among other cases, as dispositive of the Fourth and Fourteenth Amendment questions this Court's decisions in *Hurtado v. California*, 110 U.S. 516 (1884) and *Lem Woon v. Oregon*, 229 U.S. 586 (1913). This argument was unavailing. The Court of Appeals erroneously found them inapplicable and held that they related to the due process question of the necessity for a magistrate's preliminary examination of probable cause prior to the filing of an information and were not persuasive as to the instant question.

The petitioner also cited as controlling authority *Ocampo v. United States*, 234 U.S. 91 (1914), and *Beck v. Washington*, 369 U.S. 541 (1962). The lower court summarily ruled that *Ocampo* "decided the narrow issue of the necessity for investigation by a judicial officer *before* arrest" (Emphasis by the Court). (App. 12). Thereafter the lower court quotes *Ocampo* to the effect that probable cause is neither a judicial act nor is it equivalent to an acquittal. This is petitioner's position exactly. For as this Court further said in *Ocampo* at page 100, "In short the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial and not such that because of its nature it must necessarily be confined to a strictly judicial officer or tribunal."

Beck, supra, was disposed of by the lower court in a footnote as adding "nothing to Ocampo" in that *Beck* deals with "prior probable cause hearings." (App. 12). In so doing, the court ignored completely the following statement of law in *Beck:*

> "Ever since Hurtado v. California, 110 U.S. 516, 28 L.Ed.232, 4 S.Ct. 111 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some 50 years ago. *Since that time, prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as Ocampo v. United States*, 234 U.S. 91, 51 L.ed.1231, 34 S.Ct. 712 (1914) and *Lem Woon v. Oregon*, 229 U.S. 586, 57 L.ed.1340, 33 S.Ct. 783 (1913)." [Emphasis supplied.]

Justice Clark in so writing for the *Beck* majority was certainly aware of Washington law which requires neither *prior nor subsequent* judicial determinations of probable cause. The law of that state is set out in *State v. Ollison*, (Wash. 1966) 411 P.2d 419. There the defendant after arrest on a warrant had a preliminary hearing date set by a justice of the peace for a "probable cause" determination. Prior to that date the prosecuting attorney filed an information in the superior court on the same charges. The defendant was subsequently arraigned, tried and convicted. The defendant on appeal argued that it was error not to grant a preliminary hearing *after* the filing in superior court of the direct information by the prosecutor. Finding no merit in this position the Washington Supreme Court said:

> "We see no error in the superior court denial of a preliminary hearing *after* the information had been filed. A prosecuting attorney in the exercise of his official powers, where he has good cause to believe that a crime has been committed and that he can prove the defendant is guilty thereof, may file an information directly in the superior court without a preliminary hearing. In such a case, the preliminary hearing is not deemed requisite to or an essential element of due process of law." [Emphasis supplied].

The direct filing of criminal informations without prior or subsequent judicial probable cause determinations

has long been sanctioned in Florida. §15 Declaration of Rights to the Florida Constitution; *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); *Bradley v. State*, (Fla. 1972) 265 So.2d 533; *Anderson v. State*, (Fla. 1970) 241 So.2d 390. It is also the practice, inter alia, in the states of Iowa, *State v. Clark*, (1965) 138 N.W.2d 120; Montana, *Petition of Knight*, (1964) 394 P.2d 855; Wyoming, *Orcutt v. State*, (1961) 366 P.2d 690, cert. denied 385 U.S. 874; Arkansas, *Beckwith v. State* (1964) 379 S.W.2d 19; and Connecticut, *State v. Hayes*, (1941) 18 A.2d 895. In the latter case the Connecticut Supreme Court said that state's attorneys have this power because they are invested with the common law power of attorney general. The filing of direct informations had been followed in Connecticut for nearly two centuries prior to 1941, and the practice, had, the court said, been "in vogue" prior to the adoption of the Connecticut constitution. It was further said by the court that "the investigation by the state's attorney and the determination by him that there is reasonable ground to proceed takes the place of a preliminary hearing by a magistrate and sufficiently fulfills all of the requirements of due process of law." [Citing, inter alia, *Hurtado v. California*, supra.]

The foregoing state authorities recognize the power of state prosecutors to sit, in effect, as a one man grand jury. The District Court thus should have given the same weight to a prosecutor's finding of probable cause as it did to a grand jury's. To the contrary it misconstrued Florida law entirely and exempted from judicial probable cause hearings persons charged with crimes by grand jury indictment (the same point was argued to and ignored completely by the Court of Appeals). The District Court, in so ruling, said that after a grand jury returns an indictment to a

judge, that judge reviews it and either issues an arrest warrant "and causes the indictment to be filed or dismisses the charge." App. 32. The Court then went on to say that this particular procedure provides "for a probable cause hearing, by a judicial officer, prior to trial and . . . [is] not therefore under attack in this litigation." (App. 33).

Under Florida law there is no probable cause determination by a judge as to criminal charges set out in indictments. The judge does not review the indictment and then "cause it to be filed" or dismiss the charge. Under Florida law and practice the judge presiding over a grand jury, once an indictment is handed up has only a ministerial function to perform. Under Amended Rule 3.130(k) of the Florida Rules of Criminal Procedure (formerly Rule 3.150[a]), "Upon the filing of either an indictment or information charging the commission of a crime, if the person named therein is not in custody or at large on bail for the offense charged, the judge *shall* issue or *shall* direct the clerk to issue, either immediately, or when so directed by the prosecuting attorney, a capias for the arrest of such person . . ." [Emphasis supplied.].

The very nature of the criminal jurisprudential system in Florida makes the District Court's error (ratified by the Court of Appeals) manifest when it speaks of preliminary review of an indictment by a judge. In Florida, once indicted, the next stop in the system for the defendant is not the judge presiding over the grand jury, but the trial court and arraignment and other proceedings therein.

Professor Wright, in 1 *Federal Practice and Procedure*, 137, §80, recognizes that it is grand jurors who determine probable cause and not a judge:

". . . It has recently been said that 'our federal courts uniformly have held that there is no necessity for a preliminary hearing after a grand jury has returned an indictment' [Citing *Crump v. Anderson* (D.C. Cir. 1965) 352 F.2d 649]. For this proposition an abundance of authority may be cited. If the only purpose of the preliminary examination is to determine whether there is good cause for holding the defendant, this is an entirely logical rule. The grand jury has determined the issue of probable cause and there is no need to have a determination by the magistrate. Accordingly, it is held that where a person is first arrested after indictment, rather than on complaint, he is not entitled to a preliminary examination . . . And finally if he is first held on a complaint, but thereafter an indictment is returned, a preliminary examination need not be held, or, if it has been commenced, it need not be concluded for the indictment is sufficient evidence of probable cause."

The Wright view as to indictments is applied in Florida to informations. *Karz v. Overton* (Fla. 1971) 249 So. 2d 763; *Maxwell v. Blount* (Fla. 1971) 250 So.2d 657.

A multitude of decisions from the various circuits was cited below for the proposition that due process does not mandate preliminary hearings in cases such as the instant one. These included *Scarborough v. Dutton* (5th Cir. 1968) 393 F.2d 6; *Kerr v. Dutton* (2d Cir. 1968) 393 F.2d 79; *Sciortino v. Zampano* (3d Cir. 1969) 358 F.2d 132; *Rivera v. Gov't of the Virgin Islands* (4th Cir. 1967) 375 F.2d 988; *Barber v. U.S.* (6th Cir. 1944) 142 F.2d

805; *U.S. v. Luxenberg* (7th Cir. 1967) 374 F.2d 805; *Weber v. Ragen* (8th Cir. 1949) 176 F.2d 579; *U.S. v. Gross* (9th Cir. 1969) 416 F.2d 1205; *Austin v. U.S.* (10th Cir. 1969) 408 F.2d 808 and *Swingle v. U.S.* (D.C. Cir. 1968) 389 F.2d 220. In finding these cases not controlling the lower court sought to distinguish them on the basis that the issue in each of them was the validity of the trial as affected by lack of a preliminary hearing and not the validity of pre-trial detention as such. *Ocampo* and *Beck*, supra, are contrary to this position and should have been controlling authority.

The important question of federal constitutionality decided below and the conflicts it creates with prior decisions of this Court, the decisions of other courts of appeal and with applicable Florida law justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises A Significant Comity Question And The Court Of Appeals Erred In Upholding The United States District Court's Interference In A State Criminal Proceeding.

The court of appeals below held that reasons of comity do not bar this suit. Quoting from its earlier decision in *Morgan v. Wofford* (5th Cir. 1972) 472 F.2d 822 the court reiterated that abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1970) "was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred." (App. 8).

In affirming the declaratory and injunctive relief granted by the District Court, the Court of Appeals has

caused the very federal-state court frictions warned about in the concurring opinion in its decision in *Le Flore v. Robinson* (5th Cir. 1971) 446 F.2d 715, 719.

Due process does not compel the granting of a preliminary hearing. There was, accordingly, no basis for the District Court's interference in the criminal justice system in Dade County, Florida. As this Court said in *Younger*, supra, at 401 U.S. 44:

> "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism . . .'"

It is submitted that the extraordinary circumstances necessary before the comity rule as heretofore espoused by this Court, can be overcome, were not present in the instant case below.

By virtue of the decision of the Court of Appeals below upholding the interference by the District Court into a Dade County, State of Florida criminal proceeding, a grave question of comity has been created.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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September 7, 1973

CERTIFICATE OF SERVICE

I, LEONARD R. MELLON, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of September, 1973, I served three copies of the Petition for Writ of Certiorari on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents, and Peter L. Nimkoff, Esquire, Suite 607, Ainsley Building, 14 N.E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by first class mail in a duly addressed envelope with postage prepaid.

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APPENDIX

APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1585

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Intervenors,

versus

JAMES RAINWATER, MORTON S. PERRY, SIDNEY SEGALL, Judges, Etc., ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

(August 15, 1973)

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

TUTTLE, Circuit Judge: We review here a District Court's holding that each Dade County, Florida arrestee held for trial upon an information filed by the state attorney is entitled by the Fourth and Fourteenth Amend-

ments to an expeditious hearing before a judicial officer on the question of probable cause for arrest.[1] To implement this holding, the court later adopted a plan submitted by Sheriff E. Wilson Purdy (hereinafter the Purdy Plan), which required, inter alia, that persons arrested with or without warrants in Dade County, be accorded expeditious preliminary hearings before a magistrate and that those not accorded such hearings be released immediately.[2] Implementation of the Purdy Plan was stayed by this court's order of March 31, 1972, pending appeal, during which time Dade County's judiciary moved voluntarily to establish its own plan for providing preliminary hearings. Following oral argument, on October 18, 1972, we vacated the stay order, directed the District Court to make specific findings on the constitutional deficiencies, if any, of the then-current preliminary hearings practices, and authorized implementation of the Purdy Plan.

On December 6, 1972, the Florida Supreme Court issued its Amended Rules of Criminal Procedure. These rules, which took effect February 1, 1973, provide for a committing magistrate system. The differences between the Purdy Plan and these Amended Rules provided the focus for the District Court's findings pursuant to our order, which were filed on March 12, 1973.

In light of the aforementioned intervening developments, we must resolve the following questions: (1) Should the District Court have abstained from ruling on the constitutionality of Dade County's lack of preliminary hearings in cases proceeded upon by information filed by

[1]Pugh v. Rainwater, 332 F.Supp. 1107 (S.D. Fla. 1971).

[2]Pugh v. Rainwater, 336 F.Supp. 490 (S.D. Fla. 1972).

the state attorney? (2) Do arrestees prosecuted upon informations certifying probable cause for arrest by the state attorney have a constitutional right to preliminary hearings before a magistrate? and (3) In what respects, if any, are the Amended Rules constitutionally deficient in their provisions for preliminary hearings?

I. Background

Persons arrested for felonies and most misdemeanors in Dade County, Florida are routinely brought to the Metropolitan Dade County Jail. Aside from capital cases, which must be tried on indictment by a grand jury, all other criminal cases in Florida may be commenced by "information filed by the prosecuting attorney under oath." Florida Statutes §904.01. Although preliminary hearings on probable cause for arrest with or without warrant are mandated by statute,[1] the Florida judiciary has consistently held that such hearings are not required where the state prosecutes by filing an information cer-

[1]F.S. 901.06 "Duty of officer after arresting with warrant. — When the arrest by virtue of a warrant occurs in the county where the alleged offense was committed and where the warrant was issued, *the officer making the arrest shall without unnecessary delay take the person arrested before a magistrate* who issued the warrant or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

F.S. 901.23. "Duty of officer after arrest without warrant. — An *officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before* the nearest or most accessible *magistrate* in the county in which the arrest occurs, having jurisdiction and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county." (Emphasis added).

tifying probable cause for arrest.[4] Though the Florida Supreme Court has not been insensitive to the constitutional ramifications of incarceration without any preliminary probable cause hearing, it has declined to hold these practices unconstitutional or to fashion relief for arrestees held upon informations.[5] Amended Rule 3.131, which provides for a right to a preliminary hearing on any felony charge "*unless charged in an information* or indictment," (Emphasis added), preserves the previous practice of permitting the state attorney's certification to obviate the need for a preliminary hearing.

Criminal actions in Dade County, therefore, often proceed upon information sworn to by the state attorney either before or after arrest without any judicial scrutiny prior to arraignment.[6] If unable or unwilling to post bail, arrestees remain in jail at least until arraignment. This incarceration may last as long as 30 days,[7] and at least

[4]Bradley v. State, 265 So.2d 533 (Fla. 1972), cert. denied, 41 L.W. 3524; Anderson v. State, 241 So.2d 390 (Fla. 1970); Sangaree v. Hamlin, 235 So.2d 729 (Fla. 1970); State v. Hernandez, 217 So.2d 109 (Fla. 1968); Palmieri v. State, 198 So.2d 633 (Fla. 1967); Montgomery v. State, 176 So.2d 331 (Fla. 1965); Baugus v. State, 141 So.2d 264 (Fla. 1962).

[5]State ex rel. Carty v. Purdy, 240 So.2d 480 (Fla. 1970); Milton v. Cochran, 147 So.2d 137 (Fla. 1962).

[6]F.S. 908.01. "Arraignment of defendant: how made. — When an indictment has been found or an information filed against a person he shall, before he is put on trial for the offense charged, be arraigned by having the charge stated to him by the prosecuting attorney in open court and by being called upon to plead thereto. If the defendant so demands before he pleads, the indictment or information shall be read to him by the prosecuting attorney. An entry of the arraignment shall be made of record."

[7]The district court found:

"The state attorney, between January 1, 1970, and March 31, 1971, decided not to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these 'no actions' resulted from arrests on charges lacking sufficient evidence to justify the filing of an information." 332 F.Supp. at 1110.

Moreover, nearly one-fifth of the total number of cases disposed of by the state attorney in 1970 (1,565 out of 7,856) were acquittals. The court noted that the average delay period of ten to fifteen days between arrest and arraignment caused incarceration of many defendants subsequently acquitted and unnecessary expenditure of tax dollars to maintain Dade County's jails. The practical effect of prompt judicial probable cause hearings the court surmised, would be a lessening of both human misery and the tax burden because a judge's finding of no probable cause would cause dismissal of spurious prosecutions forthwith.

three days must pass before an information is filed against an arrestee and the case is calendared. During this period, the defendant sees no judicial officer other than the bail judge. Arraignment is the first opportunity for a magistrate to inspect the state attorney's information setting forth the cause upon which the defendant was arrested.[8]

The plaintiffs in this action, charged with various offenses under Florida law,[9] filed a class action in the federal court on behalf of themselves and all other Dade

[8]For purposes of this appeal, we assume that because Florida Statutes §906.06 requires the state attorney to state the offense on the information form and §906.07 says that "the court, on motion, may order the prosecuting attorney to furnish a bill of particulars," the defendant could challenge the information for failure to show sufficient probable cause upon which to continue the prosecution. Otherwise, the trial itself would present the first such opportunity for a probable cause challenge before a judicial officer. While bail hearings apparently are afforded even where the state prosecutes by information, there is no showing on this record that these hearings have ever been utilized to require the State Attorney to show probable cause for arresting as well as the reasons for setting bail at a particular level or for denying bail altogether.

[9]Plaintiff Robert Pugh was charged with robbery, a felony which was and is punishable by life imprisonment under Florida law. Plaintiff Nathaniel Henderson was charged with assault and battery, a misdemeanor under Florida law.

County arrestees detained solely upon direct informations in which the state attorney certified probable cause for arrest and detention. They alleged that their pre-trial detention was in violation of the Constitution, and sought declaratory and injunctive relief entitling them to preliminary hearings.

II. Abstention

Fully cognizant that "A federal lawsuit to stop a prosecution in a state court is a serious matter." *Younger v. Harris*, 401 U.S. 37 at 42 (1971), we nevertheless find that the plaintiffs' claim is not barred by considerations of federal-state comity.

This suit, a class action by arrestees contesting the quality of their present detention pending trial, sought no relief which would impede pending or future prosecutions on various charges in the state courts of Florida. Rather, while accepting that the state courts were the proper forum for consummation of criminal proceedings against them, the plaintiffs argued that the State was nevertheless obligated to submit them to preliminary probable cause hearings.

This court has declined to issue declaratory or injunctive relief interfering with pending or future state court prosecutions, *Becker v. Thompson*, 459 F.2d 919 (1972), cert. granted, sub nom *Steffel v. Thompson*, 41 L.W. 3462, unless the state statute under which the plaintiffs were being prosecuted was allegedly unconstitutional on its face, *Jones v. Wade and Dyson*, No. 72-1481, decided May 30, 1973. However, we have not declined to adjudicate federal questions properly presented merely be-

cause resolution of these questions would affect state procedures for handling criminal cases. Where, as here, the relief sought is not "against any pending or future court proceedings *as such*." *Fuentes v. Shevin*, 407 U.S. 67 at 71, n. 3, (1971), (Emphasis added), *Younger* is inapplicable.

The relief sought by these plaintiffs was not against any state prosecution *as such*, but only against the state's practice of considering the state attorney a sufficient judge of probable cause to hold arrestees until arraignment or trial. Simply declaring that the plaintiffs were entitled to pre-trial procedural rights, the District Court said that the plaintiffs should "immediately be given a preliminary hearing to determine probable cause by a committing magistrate *unless their cases have been otherwise concluded*." 332 F.Supp. at 1115, (Emphasis added). By recognizing that some plaintiffs' cases might have been concluded, the Court demonstrated that its declaration of pre-trial rights was not to impede the plaintiffs' prosecutions.

Not every unconstitutional pre-trial procedure, of course, will entitle a state court defendant to relief in federal court. For example, an unconstitutional search and seizure does not entitle the state court defendant to any injunction, but only to have the evidence excluded when presented in state court. *Mapp v. Ohio*, 367 U.S. 643 (1961). On the other hand, when a plaintiff who happens also to be a defendant in a simultaneous state court proceeding seeks to challenge an aspect of the criminal justice system which adversely affects him but which *cannot* be vindicated in the state court trial, comity is no bar to his challenge.

If these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist. Their claims to pre-trial preliminary hearings would be mooted by conviction or exoneration.

Plaintiffs' due process claim is closely analogous to that made in *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1972). In *Morgan*, we held that *Younger* did not bar a claim by a probationer who had been afforded no hearing to ascertain the amount of restitution he owed the victim of his crime. We said:

> "Abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1970) was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred . . . . we have never intimated that abstention is appropriate where there is no state court prosecution to be interfered with and where the plaintiff seeking relief in federal court has no alternative forum in which to raise his constitutional claim." Id. at 826.

In *Morgan*, the plaintiff had already been subjected to the process which we held was unconstitutional. Had these plaintiffs waited until their state criminal trials to raise their due process objections, they would have already served their periods of pre-trial detention and would be barred from any relief. *Infra*, pp. 16-17.

While the plaintiffs might have filed suit in state court for a declaratory judgment and other equitable

relief based upon the same grounds as this suit, this procedure would have required a second state court proceeding to adjudicate a federal claim not based upon the merits of the defenses to the state criminal actions. *Younger* has never been applied by our circuit to force a federal court to relinquish jurisdiction over a federal claim which could not be adjudicated in a *single* pending or future state proceeding and we decline to so apply it now.

Having held that reasons of comity do not bar this suit we need not decide whether this situation comprises an exception to *Younger*. While *Younger* said abstention is inappropriate when "great and immediate irreparable injury is threatened" Id. at 46, and even temporary unconstitutional deprivations of liberty may be such injuries, *Sweeton v. Sneddon*, 324 F.Supp. 1094 (1971), *Morgan v. Wofford*, *supra*, at 826, we need not decide whether incarceration without a preliminary hearing is an injury requiring federal intervention where *Younger* would otherwise bar our jurisdiction. Also, we need not decide whether Florida's state court decisions, cited *supra*, so clearly show that under no circumstances will the state courts accord a constitutional right to a preliminary hearing that it would have been futile to require petitioners to seek redress in the state court system.

III. Probable Cause Hearings

The central issue in this case is whether the Fourth[10] and Fourteenth[11] Amendments require that arrestees held

[10] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

[11] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

for trial upon informations filed by the state attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay.[12] More precisely, in the face of our numerous decisions holding that lack of such preliminary hearings will not vitiate a conviction,[13] are the plaintiff arrestees, nonetheless, entitled to a judgment declaring that due process necessitates a probable cause preliminary hearing before a magistrate when the state attorney prosecutes presently-confined arrestees by filing an information?

In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court rejected the proposition that due process under the Fourteenth Amendment requires state criminal prosecutions to be initiated via grand jury indictment. It said:

> "We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, *after examination and commitment by a magistrate, certifying to the probable guilt of the defendant*, with the right on his part to the aid of counsel, and to the

[12]Pre-arraignment incarceration may be subdivided into two classes: those who are eventually proceeded against by the state, either by information or indictment, and those who are released upon a finding by the state attorney that insufficient evidence for continuation of the prosecution exists. Though the class of plaintiffs here includes only those against whom the state attorney proceeds by information, we do not lightly dismiss the detention of a minimum of 1,165 defendants against whom charges are subsequently dropped. As a practical matter, the relief granted by the district court, by affording probable cause hearings after arrest to all arrestees, benefits also those against whom charges are not pressed.

[13]See, e.g. *Buchannon v. Wainwright*, 5th Cir. Slip Op. No. 72-3590 (Mar. 9, 1973); *Jackson v. Smith*, 435 F.2d 1284 (5th Cir. 1970); *Scarbrough v. Dutton*, 393 F.2d 6 5th Cir. 1968).

> cross-examination of the witnesses produced for the prosecution, is not due process of law." Id. at 538. (Emphasis added.)

Since the lack of independent judicial determination of probable cause under the Dade County information system is precisely the infirmity alleged by the appellees, *Hurtado* is of relevance only because it is the cornerstone on which later decisions were built.

Lem Woon v. Oregon, 229 U.S. 586 (1913) extended *Hurtado*, allowing the state to proceed by information where

> "The constitution and laws of Oregon . . . did not require any examination by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath." Id. at 587.

The Court refused to distinguish *Hurtado* on the ground that Oregon had not required the information to be *preceded* by a magistrate's preliminary examination and said that the opportunity for a judicial examination "*prior to* the formal accusation by the district attorney" Id. at 590 (Emphasis added), is not obligatory upon the states. Whether or not it is reasonable to infer that there is also no necessity for a *subsequent* judicial finding of probable cause without unnecessary delay is the precise issue in this case.

In *Ocampo v. United States*, 234 U.S. 91 (1914), the defendants had moved to vacate an order of arrest upon the ground that it was made

> "without any tribunal, magistrate, or other competent authority *having first* determined that the alleged crime had been committed, and that there was probable cause to believe the defendants guilty of it." Id. at 93 (Emphasis added).

Though *Ocampo* decided the narrow issue of the necessity for investigation by a judicial officer *(before arrest)*, this dictum is broad enough to encompass the instant situation.[14]

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest . . . since . . . the same act . . . does not prescribe how 'probable cause' shall be determined, it is, in our opinion, as permissable for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace." Id. at 100-101.

There is a significant difference between the *Hurtado*, *Lem Woon*, and *Ocampo* decisions and our case. Probable cause hearings *prior* to arrest place a heavy burden upon

[14] *Beck v. Washington*, 369 U.S. 541 (1962), which notes that since *Hurtado* prosecutions have often proceeded on informations filed by prosecutors without prior probable cause hearings, adds nothing to *Ocampo*.

the State. *After* arrest, but before arraignment, an entirely different situation prevails. Where the State already has the defendant in custody it is not in jeopardy of losing him before a magistrate can rule on probable cause. It is only prejudiced if the magistrate finds there was no probable cause for believing the defendant committed the crime, in which case the prosecution ought not to proceed anyway. We therefore fact [sic] squarely the plaintiffs' contention that Florida's denial of a probable cause hearing after arrest but before arraignment is constitutionally impermissible because the prosecuting attorney, who certifies the existence or non-existence of probable cause, is not sufficiently detached to make this decision.

In *McNabb v. United States*, 318 U.S. 332 (1942), after pointing out that "legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states," Id. at 342, the Court said that:

> "The purpose of this impressively pervasive requirment of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be en-

trusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. *Legislation* such as this, *requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard* — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society." Id. at 343-344. (Emphasis added).

Recently, the Supreme Court has held on several occasions that judicial detachment was constitutionally mandated. *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), held that the Fourth Amendment requires a neutral and detached magistrate to authorize the search and seizure of property by the police. Though New Hampshire argued that the Attorney General, who was authorized to issue warrants under state law, did in fact act as a neutral and detached magistrate, the Court responded:

". . . there could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the 'competitive enterprise' that must rightly engage their single-minded attention." Id. at 450.

In summary, the Court added:

"We find no escape from the conclusion that the seizure and search . . . cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." Id. at 453.

The Fourth Amendment's prohibition against warrantless searches and seizures has been applied in two arrest situations closely analogous to the one at bar. *Morrissey v. Brewer*, 408 U.S. 471 (1971) required that a parolee, after arrest, could be returned to custody for violation of parole conditions only after a hearing on probable cause before someone not directly involved. The Court emphasized that

". . . due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. *Hyser v. Reed*, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe

that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. *Goldberg v. Kelly*, 397 U.S., at 267-271.

"In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case" Id. at 485.

In *Shadwick v. Tampa*, 407 U.S. 345 (1971), the city authorized the issuance of arrest warrants by clerks of the Municipal Court. The petitioner challenged these warrants on the ground that the clerks were not neutral and detached magistrates for purposes of the Fourth Amendment as incorporated into the due process clause of the Fourteenth Amendment. The Court, accepting the proposition that the Constitution mandates that arrest warrants be issued only by "judicial officers" or "magistrates," proceeded to hold that the clerks were judicial officers. In so holding, the Court explained:

"The warrant traditionally has represented an independent assurance that a search and *arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest* or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of

being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States, supra*, at 14; *Giordenello v. United States, supra*, at 486. In *Coolidge v. New Hampshire, supra*, the Court last Term voided a search warrant issued by the state attorney general 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.' Id., at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose." Id., at 350 (Emphasis added).

Morrissey and *Shadwick* illustrate that probable cause for arrests may not always be determined by a prosecuting attorney, notwithstanding the dictum of *Ocampo*. Magistrates or other officials having the detachment of magistrates have been required to find probable cause for returning a parolee to custody and for issuing arrest warrants. Must such detachment be present in a hearing of probable cause where the state holds an arrestee upon an information sworn to by the state attorney? Because this court has said that an arrestee proceeded against by information has no constitutional right to a preliminary hearing, *Buchannon v. Wainwright, supra; Jackson v. Smith, supra; Scarbrough v. Dutton, supra*, we turn now to these decisions.

The opinion of the trial court thoroughly explores the dispositive distinction between the instant case and prior decisions discounting the existence of a due process right to a preliminary hearing:

"Numerous opinions have been cited in which this circuit has held there is no due process right to a preliminary hearing. The issue in each of those cases however, was the validity of the trial as affected by the absence of a preliminary hearing and not the validity of the pre-trial detention itself. In *Scarbrough v. Dutton*, 393 F.2d 6 (5th Cir. 1968), the Court, upholding a conviction where the defendant had been incarcerated for seven months without a preliminary hearing, stated, 'The failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction.' 393 F.2d at 7 (Emphasis added). See also; *Murphy v. Beto*, 416 F.2d 98 (5 Cir. 1969); *McCoy v. Wainwright*, 396 F.2d 818 (5 Cir. 1968); *King v. Wainwright*, 368 F.2d 57 (5 Cir. 1966); *Worts v. Dutton*, 395 F.2d 241 (5 Cir. 1968); *Kerr v. Dutton*, 395 F.2d 79 (5 Cir. 1968); cf. *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

"In *Anderson v. Nosser*, 438 F.2d 184 (5 Cir. 1971), even though the Court did not consider the validity of a conviction, the facts were analogous to those in the foregoing post-conviction cases. In each case cited supra the pretrial detention had ceased to exist, and the trial itself being valid, there was no continuing deprivation of rights. The confinement in *Anderson* occurred over a period of two to four days with the various federal complaints being filed from three months to fourteen months after plaintiffs' release. Consequently, in *Anderson*, just as in the post conviction cases the Court was asked to grant relief from a deprivation of rights no longer in effect. That the *Anderson* Court itself considered the case to come within the post conviction situation is apparent from its reliance upon *Julyk v. United States*, 414 F.2d 139 (5 Cir. 1969), and other cases, all of which turned upon the validity of a conviction, 438 F.2d at 196.

"The instant case differs from the foregoing in that this Court is asked to determine the validity of a present confinement. The complaint herein was filed during plaintiffs' incarceration. Unlike *Anderson*, the confinement at bar is not an isolated event but is a recurring part of the state sanctioned prosecutorial system. Unless corrected the wrong complained of will continue to infringe upon the rights of the individual plaintiffs and the class they represent." 322 F.Supp. at 1112-1113.

The distinction between a pre-trial declaration of a right to a hearing and a post-conviction appeal for reversal on the basis of the absence of such hearing is a pragmatic and sensible distinction. Moreover, it is simple in its application, as *Richardson v. Gerstein*, 336 F.Supp. 67 (1972), illustrates. In *Richardson*, the same district court which granted relief in this case refused to grant relief to plaintiffs who had been validly convicted and were seeking to shorten their sentences, rather than to question the quality of their pretrial detention.

While a magistrate might well arrive at the same decision as to probable cause as the state attorney, we hold that due process abhors even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system. Incarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis for this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing. Yet the Supreme Court has repeatedly held that such deprivations of property are impermissible. *Fuentes v. Shevin*, 407 U.S. 67 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

This practice may substantially prejudice defendants in preparation of their cases and result in the incarceration of defendants against whom the State dismisses charges. No countervailing state interest is fulfilled by such deprivation for, as the District Court predicted in its opinion,

> "[t]he expense of maintaining a jail, with many persons who would never be there in the first instance if their cases had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community." 332 F.Supp at 1114.

In the intervening months between issuance of our order vacating the stay of the interim panel of this court and the District Court's findings as to the interim practices followed, evidence has accumulated which fully supports this prediction. Judge Tanksley, Chief Judge of the Magistrate Division of Florida's Eleventh Judicial Circuit, for example, estimated that, as a result of the magistrate system, felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County.

We therefore affirm the judgment of the district court requiring the State of Florida to immediately give the plaintiffs a preliminary hearing to determine probable cause for their arrests unless their cases have been otherwise concluded.

IV. REMEDIES: The Amended Rules and The Purdy Plan

Subsequent to oral argument in this case, many controversial provisions of the district court's adoption of the Purdy Plan have become moot due to implementation of similar provisions for providing preliminary hearings under Florida's Amended Rules of Criminal Procedure. The parties are agreed, however, that the Purdy Plan went beyond the Amended Rules in certain respects. To the import of these remaining divergencies we now direct our attention.

a) *Time between arrest and preliminary hearing.*

In the district court's Purdy Plan order, it was held:

> "If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be

> held within four (4) days [of initial appearance]." 336 F.Supp. at 492.

The initial appearance under the Purdy Plan had to be within 3 hours of arrest. The new rules provide for a preliminary hearing within 72 hours, or 3 days, of initial appearance,[15] and such initial appearance is required within 24 hours of arrest. However, Rule 3.040 of the Amended Rules contains this proviso:

> "When the period of time prescribed or allowed [under all rules other than 3.130] shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Thus appellants argue that a six day lapse is frequently allowed between arrest and preliminary hearing under the Amended Rules. This time lapse, they say, is beyond the constitutionally tolerable maximum and therefore denies them due process of law under the Fourteenth Amendment.

Whether a four-day lapse is constitutional while a six-day lapse is not would be a difficult factual question. We need not, however, face this nice question, because no appellant argues that he has been accorded a preliminary hearing more than four but less than six days after his arrest.

However, because the District Court's Purdy Plan order established an across-the-board four-day maximum lapse period which conflicts with Rule 3.040, we cannot

[15]Rule 3.131(b), Florida Rules of Criminal Procedure.

allow both the Plan and the Rule to coexist in their inconsistency. We therefore vacate that portion of the Purdy Plan order which set a four-day maximum period on the ground that it was unnecessary to the disposition of this case.

b) *Exclusion of misdemeanants.*

The appellants argue that since Rule 3.131(a) authorizes hearings before a neutral and detached judicial officer only "on any felony charge" the rule violates the Equal Protection Clause by denying such hearings to misdemeanants. We agree that this proviso to the Rule is constitutionally impermissible.

Plaintiff Henderson, who was charged with the misdemeanor of assault and battery under Florida Law and who had been incarcerated prior to trial without the benefit of a probable cause hearing, has standing to raise this point on behalf of himself and other incarcerated misdemeanants. Moreover, the proviso of the statute is so clear that we need not certify the question whether Rule 3.131(a) was intended to provide for preliminary hearings for misdemeanants. Clearly, it was not so intended.

No sufficient justification exists for disallowing preliminary hearings for misdemeanants. The plight of an accused misdemeanant incarcerated without a hearing is just as serious as that of an accused felon, and there is no merit to either of the two "compelling governmental interests" which the State contends are served by not prescribing hearings for misdemeanants.

First, the State argues it is concerned lest the same magistrate determining probable cause in a misdemeanor case try that very case, denying the defendant a fair trial. The answer to this is not the denial of preliminary hearings, but the development of a system whereby judges are rotated to prevent such overlap. Indeed, the Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit has already testified that preliminary hearings and misdemeanor trials are currently conducted by separate panels of judges in Dade County.

Second, it is argued that the State cannot bear the expense of providing preliminary hearings for misdemeanants. The trial court found that

> "while more magistrates as well as courtroom facilities may be needed as a result of our order, and that costs may increase in the short run, it will not be a significant increase."

This finding was amply supported. The number of misdemeanor cases involving no pretrial incarceration and requiring no preliminary hearings comprised the bulk of all misdemeanors. Moreover, experience from the felony-hearing system showed a reduction in felony caseloads and a savings to the taxpayers of the county.[16]

Argersinger v. Hamlin, 407 U.S. 25 (1972), which held that misdemeanants threatened with potential incarceration must be afforded counsel at State expense, provides guidance in this case. In *Argersinger*, Mr. Justice Douglas, speaking for the majority of the Court, noted

[16]See text *supra* at tp. 22.

that many rights required under the due process clause of the Fourteenth Amendment[17] apply irrespective of the classification of the charge pending against the defendant who faces potential incarceration. We believe the right to a preliminary probable cause hearing before a defendant is subjected to pretrial incarceration is as essential to due process as those rights listed in and extended by *Argersinger*. Therefore, except where misdemeanants are out on bond or are charged with violating ordinances carrying no possibility of pre-trial incarceration,[18] they must be accorded preliminary hearings. In short, the offense charged is irrelevant to the man incarcerated prior to trial; he must, therefore, be afforded a preliminary hearing regardless of his status as an accused misdemeanant or an accused felon.

c) *Delayed hearings in capital or life imprisonment cases.*

Rule 3.131(b) of the Florida Rules of Criminal Procedure provides:

> "In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 72 hours of the time of the defendant's first appearance. *In all capital offenses and*

[17]Included in this listing were rights to a "public trial," to be informed of the nature and cause of the accusation, to confront one's accusors, and to have compulsory process for obtaining witnesses in one's favor.

[18]These offenses, which probably include those referred to by the district court as "prosecutions of the barking dog variety," may reasonably be screened by the State Attorney alone at the request of complaining citizens because the defendant in such cases is not confined prior to trial.

> *offenses punishable by life imprisonment* and in all cases where the defendant is not in custody, *the preliminary hearing shall be held within seven days of the time of defendant's first appearance.*"

Though we know of no Florida decision interpreting whether "within seven days" is covered by the Rule 3.040 proviso, *supra*,[19] we need not attempt to divine how these rules would dovetail since we are convinced that even in [sic] Rule 3.131(b) is outside the time limit set in Rule 3.040, any preliminary hearing delay which discriminates against those accused of capital or life imprisonment offenses violates the Equal Protection Clause.

Under Rule 3.131(b), Florida has classified these types of offenses in a manner which disadvantages the party charged with the more serious offense even though the defendant has not yet had any opportunity to contest the basis for his arrest. In order to justify this discrimination, Florida must make some showing that there are factors requiring different treatment of these offenses from the treatment given to other felonies. While four days may be a reasonable time, as the district court found, to allow witnesses to be summoned and other mechanical tasks to be performed, Florida has made absolutely no showing that it requires more time to handle the mechanics of a preliminary hearing where life or capital offenses are involved than in other felony or misdemeanor cases. In the absence of such showing, we find that Rule 3.131(b) is inconsistent with the demands of the Equal Protection

[19] If this were the case, a lapse of 10 calendar days between arrest and preliminary hearing would be permitted.

Clause insofar as it delays the preliminary hearings of persons in Robert Pugh's position.[20]

d) *Sanctions against the State in the event of noncompliance.*

To ensure prompt implementation of its requirement to probable cause preliminary hearings, the district court included the following paragraph in its Purdy Plan order:

> "17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge." 336 F.Supp. at 492.

> "19. . . . (2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal." 366 F.Supp. at 493.

[20] Pugh was charged with robbery, a crime punishable by life imprisonment in Florida. See fn. 9.

These paragraphs were at the time considered necessary by the court as a means for overcoming Florida's longstanding practice of denying preliminary hearings to criminal defendants.

Since Florida's practices have presumably been altered drastically with the adoption of the Amended Rules and preliminary hearings should now be an accepted procedure throughout the State, we vacate these two provisions in the Purdy Plan. The factors involved in the imposition of sanctions having changed significantly since the Purdy Plan was issued, the District Court's exercise of equitable power should be modified to account for these changes. At least until such time as experience shows that Dade County's judiciary and constabulary are not following the Rules of Criminal Procedure as modified to extend the right of preliminary hearings in accordance with this opinion, we will not presume that such onerous sanctions are necessary to insure compliance with the law of this circuit.

The judgment of the District Court is AFFIRMED in part and VACATED in part.

[TITLE OMITTED]

(Filed October 1, 1971)

OPINION AND FINAL JUDGMENT

Plaintiffs Robert Pugh and Nathaniel Henderson brought this class action, in which plaintiffs Thomas Turner and Gary Faulk have intervened, seeking relief for the alleged deprivation of their rights as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is founded upon 28 U.S.C. 1343 (3), (4) and grows out of a Constitutional attack (42 U.S.C. 1983) upon the procedure whereby plaintiffs were incarcerated, upon information filed by the state attorney, and held for trial in Dade County, Florida, without review by a committing magistrate of the probable cause for their arrest.

The defendants herein are sued in their official capacities (sheriff, police chiefs, state attorney, justices of the peace and judges of small claims courts of Dade County and several of its municipalities) as individuals charged with the responsibility of administering the system under which plaintiffs were incarcerated.

The plaintiffs contend that they have been deprived of a Constitutional right to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offenses with which they are charged.

Under the present procedure the state attorney (or one of his assistants) considers the reports submitted by police officers of the results of their investigations and thereafter files a direct information and issues a capias for arrest of the individual charged with the offense The person may be already in jail or is then arrested and waits in jail until either he is released on bond or is tried. There is no review by a judicial officer as to the probable cause for the arrest and detention of a person charged by the state attorney in a direct information.

Plaintiffs further allege they have been denied their constitutionally protected right to equal protection of the law in that in certain instances the police will process cases through the offices of the justices of the peace instead of going to the office of the state attorney as was done herein. A justice of the peace conducts a preliminary hearing for probable cause whereas the state attorney does not. It is contended that the unfettered discretion of the police in deciding whether to file criminal charges with the justice of the peace or the state attorney, results in an arbitrary and unreasonable creation of two classes of arrested persons, those who are afforded a preliminary hearing and those who are not.

Lastly plaintiffs contend that the setting of a monetary bail bond as a condition for the release of persons financially unable to post the bond creates two classes of arrested persons and discriminates against poor persons, thereby violating their right of equal protection of the law. Plaintiffs Henderson, Turner and Faulk allege they remain imprisoned because of their impoverished financial conditions.

In the case of plaintiff Pugh no bond has been set pursuant to F.S.A. Constitution, Article 1, §14 since the main pending charge is robbery, a crime punishable by life imprisonment, F.S.A. 813.011.

On May 13, 1971 the Court, upon the request of all counsel took the plaintiff's pending motions for summary judgment under advisement for the purpose of permitting the Florida Legislature an opportunity to consider pending legislation providing for the type of probable cause hearing sought herein. The Legislature adjourned without enacting the proposed statute and this case was set for final hearing. In the course of arguing their respective positions during final hearing, all counsel agree that there are no issues of fact to be resolved in this suit and that the issues can, and should, be determined as a matter of law.

Consistant [sic] with the philosophy of non-intervention in state criminal procedures the Court afforded the parties a reasonable time, subsequent to the final hearing, within which to attempt to agree upon the implementation of a system securing to all persons the protection of judicial review of the probable cause for arrest. This proved fruitless. The time of restraint is past and the Court has no alternative except to act.

UNDISPUTED FACTS

A person may be charged with a crime in Dade County, Florida, in one of five ways:

(1) A police officer witnesses the commission of a crime, places the accused under arrest and

takes him to jail. Sometime between 24 hours and two weeks later the arresting officer files a sworn affidavit with the office of the state attorney who, then files a direct information and issues a capias against the defendant.

(2) A police officer conducts an investigation of an alleged criminal offense, decides he has sufficient evidence to arrest, and places the defendant in jail. The arresting officer then goes to the state attorney with his affidavit and a direct information is filed against the defendant by the state attorney.

(3) A police officer conducts an investigation but takes the case to the state attorney before making the arrest and, after issuance of the direct information, arrests the defendant and places him in jail.

(4) A police officer conducts an investigation, presents the matter by affidavit to a justice of the peace, who issues a warrant for arrest and conducts a preliminary hearing to determine probable cause as to the commission of the alleged crime. The defendant is released if no probable cause is found to exist.

(5) The results of an investigation are submitted by the state attorney to the grand jury, which determines probable cause and returns an indictment to a judge. After review, the judge either issues the arrest warrant and causes the indictment to be filed or dismisses the charge.

Under the process outlined in paragraphs 1, 2, and 3 above there is no judicial determination, prior to trial of whether or not there is probable cause to believe that the particular defendant under arrest did in fact, commit the offense for which he is being held in custody. The procedures outlined in paragraphs 4 and 5 provide for a probable cause hearing, by a judicial officer, prior to trial and are not therefore under attack in this litigation.

When an accused person is informed against by the state attorney and arrested, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files his affidavit of facts. In spite of the fact that officers are urged to file their affidavit with the state attorney as promptly as possible periods from twenty-four hours to more than two weeks elapse before the affidavit is filed and processing begins.

The state attorney, between January 1, 1970 and March 31, 1971, decided *not* to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these "no actions" resulted from arrests on charges lacking sufficient evidence to justify the filing of an information.

Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all of these cases with a tremendous saving of human misery (to all those who had been arrested on insufficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida).

Once the state attorney's office decides to file the information a period of twenty-four to seventy-two hours plus weekends is required to prepare the information for filing with the Clerk of the Criminal Court of Record. The information is then filed and set for arraignment with an average delay of ten to fifteen days from the time the arresting officer appears until the time the defendant is arraigned.*

At no time prior to trial is a defendant who is proceeded against by information afforded a hearing to determine the existence of probable cause. It is the policy of the state attorney to oppose any attempt to secure such a hearing.

JURISDICTION

Where the Federal Court is asked to pass upon the validity of state criminal procedures, the question of jurisdiction requires careful scrutiny. Defendants urge that the Federal Anti-Injunction Statute, 28 U.S.C. 2283, along with the recent Supreme Court decisions in a series of cases led by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), remove this cause from the Court's jurisdiction. See, *Boyle v. Landry* 400 U.S. 77, 91 S.Ct. 758, (1971); *Dyson v. Stein*, 400 U.S. 200, 91 S.Ct. 769 (1971); *Samuels v. Mackell*, 400 U.S. 66, 91 S.Ct. 674 (1971); *Perez v. Ledesma*, 400 U.S. 82, 91 S.Ct. 674 (1971); *Byrne v. Karalexis*, 400 U.S. 216, 91 S.Ct. 777 (1971).

*Although the record does not reflect the ultimate disposition of the direct information cases alone, it does appear that of the total of 7,856 cases disposed of by the state attorney in 1970, there were 198 "nolle pros", and 1,565 acquittals.

The Anti-Injunction Statute provides that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments", 28 U.S.C. §2283. The *Younger* case rested not upon an interpretation of this statute and the exceptions thereto but upon "the national policy forbidding Federal Courts to stay or enjoin pending State Court proceedings except under special circumstances", 401 U.S. at 41.

Under *Younger, et al* as well as under the statute the relief precluded is the enjoining of a prosecution or a declaratory judgment with the same effect, *Samuels v. Mackell*, supra. Moreover, in each of the *Younger* cases the requested relief included a declaration of unconstitutionality of a state substantive criminal statute. Plaintiffs at bar ask the Court neither to declare unconstitutional a state statute nor to enjoin a prosecution, but instead pray for a declaration of procedural rights and an injunction from the continued denial thereof. This case is therefore not in conflict with either *Younger* or 28 U.S.C. §2283. Furthermore, even were the relief requested herein considered to be within *Younger*, the circumstances of this case would come within the exceptions to that principle.

Mr. Justice Black outlined in *Younger* the circumstances under which a Federal Court can enjoin a state criminal proceeding. There must be a "great and immediate" "irreparable injury" other than the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution," and the injury must be one that cannot be eliminated by the defense therein, 401 U.S. at 46,

91 S.Ct. at 751. Although *Younger* recognizes that jurisdiction would exist where a state prosecution was brought in bad faith or for harrassment, as in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), it is clear that these factors are not additional prerequisites to relief but are indicative of irreparable injury. See also *Duncan v. Perez*, No. 31089, 5 Cir. June 14, 1971. In describing the harassment present in *Dombrowski*, the Court noted that "[t]hese circumstances . . . sufficiently establish the kind of irreparable injury sufficient to justify federal intervention", 401 U.S. at 48, 91 S.Ct. at 752.

Plaintiffs at bar are challenging the validity of their imprisonment pending trial with no judicial determination of probable cause. These facts present an injury which is both great and immediate and which goes beyond cost, anxiety, and inconvenience. Furthermore, the state has consistently denied the right asserted, so that the injury is irreparable in that it cannot be eliminated either by the defense to the prosecution or by another proceeding. See *Anderson v. State*, 241 So.2d 390 (Fla. 1970); *Sangaree v. Hamlin*, 235 So.2d 729 (Fla. 1970); *Montgomery v. State*, 176 So.2d 331 (1965); *Baugus v. State*, 141 So.2d 264 (1962)*. For the reasons stated the Court finds that it has jurisdiction in this cause.

CONSTITUTIONAL QUESTIONS

The principal constitutional issue for determination is, of course, whether one who is arrested and held for trial upon an information filed by the state attorney is

*The case law cited relates only to count 1 of the complaint. Lengthy consideration of counts 11 and 111 is unnecessary in light of the holdings which follow.

entitled to a hearing before a judicial officer on the question of probable cause.

The Court is faced with a unique factual situation which does not appear to be controlled by the plethora of cases cited by counsel. Defendants rely on *Woom v. Oregon*, 229 U.S. 586, 33 S.Ct. 783 (1914) in which the Supreme Court held that an Oregon defendant who was accused by sworn complaint before a committing magistrate had no right to an examination as a condition precedent to the filing of an information by the district attorney. In *Woom* the Court was concerned with the validity of the information rather than the pre-trial detention. Furthermore, that case did not consider a procedure resulting in lengthy detention after arrest where neither a sworn complaint nor an information had been filed.

It is significant that the *Woom* case relied on *Hurtado v. California*, 110 U.S. 516, 4 C. Ct [sic] 111 (1884) holding that a grand jury indictment was not a prerequisite to a felony prosecution, and stating:

> . . . we are unable to say that the substitution for a presentment or indictment by a grand jury *of the proceeding by information after examination and commitment by a magistrate, certifying to the probable quilt* [sic] *of the defendant* with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." (emphasis added) 110 U.S. at 537, 4 S.Ct. at 122.

Numerous opinions have been cited in which this circuit has held there is no due process right to a pre-

liminary hearing. The issue in each of those cases however, was the validity of the trial as affected by the absence of a preliminary hearing and not the validity of the pre-trial detention itself. In *Scarborough v. Dutton*, 393 F.2d 6 (5 Cir. 1968) the Court, upholding a conviction where the defendant had been incarcerated for seven months without a preliminary hearing, stated, "The failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights *which would vitiate the subsequent conviction*". 393 F.2d at 7 (emphasis added). *See also: Murphy v. Beto*, 416 F.2d 98 (5 Cir. 1969); *McCoy v. Wainwright*, 396 F.2d 818 (5 Cir. 1968); *King v. Wainwright*, 368 F.2d 57 (5 Cir. 1966); *Worts v. Dutton*, 395 F.2d 341 (5 Cir. 1968); *Kerr v. Dutton*, 395 F.2d 79 (1968); cf. *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157 (1961).

In *Anderson v. Nosser*, 438 F.2d 183 (5 Cir. 1971), even though the Court did not consider the validity of a conviction, the facts were analogous to those in the foregoing post-conviction cases. In each case cited supra the pretrial detention had ceased to exist, and the trial itself being valid, there was no continuing deprivation of rights. The confinement in *Anderson* occurred over a period of two to four days with the various federal complaints being filed from three months to fourteen months after plaintiffs' release. Consequently, in *Anderson*, just as in the post conviction cases the Court was asked to grant relief from a deprivation of rights no longer in effect. That the *Anderson* Court itself considered the case to come within the post conviction situation is apparent from its reliance upon *Kulyk v. U.S.*, 414 F.2d 139 (5 Cir. 1969), and other cases, all of which turned upon the validity of a conviction, 438 F.2d at 196.

The instant case differs from the foregoing in that this Court is asked to determine the validity of a present confinement. The complaint herein was filed during plaintiffs' incarceration. Unlike *Anderson*, the confinement at bar is not an isolated event but is a recurring part of the state sanctioned prosecutional system. Unless corrected the wrong complained of will continue to infringe upon the rights of the individual plaintiffs and the class they represent.

A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police and/or prosecutor violates the principles which underly this country's founding and which are the essence of the constitutional guarantees of freedom from unreasonable seizure and from deprivation of liberty without due process of law.

The danger inherent in a system of this kind was described by Mr. Justice Frankfurter in *McNabb v. United States:*

> [l]egislation requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.
>
> The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disre-

> gard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. 318 U.S. 332, 343-44, 63 S.Ct. 608, 614 (1943).

Over forty years ago the Florida Legislature (1939) enacted a statute requiring any officer arresting without a warrant to take the defendant before a committing magistrate *without unnecessary delay*, F.S.A. 901.23. Thus we see the requirement for a preliminary hearing is not a new innovation in the law of the State of Florida.

The Fourteenth Amendment provides that no state shall deprive any person of liberty without due process of law. The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

It has been held that a hearing must be given *before* a drivers license and vehicle registration can be suspended, *Bell v. Burson*, 91 S.Ct. 1586 (1971); *Salkay v. Williams*, No. 30090 (5 Cir. June 22, 1971); *before* prohibiting the sale of liquor to an individual for one year, *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Cr. [sic] 507; *before* termination of welfare payments (even though a subsequent hearing was afforded), *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *before* garnishment of wages (even though there was a subsequent trial), *Snidash v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1920 (1969); *before* a thirty day suspension from a public school, *Williams v. Dade County School Board*, 441 F.2d 299 (5 Cir. 1971); *before* refusal of admission to public hospital staff, *Sosa v. Board of Managers*, 437 F.2d 173 (5 Cir. 1971); and *before* termination of employment on faculty, *Ferguson v. Thomas*, 430 F.2d 852 (5 Cir. 1970). It would appear beyond question that due process demands a preliminary hearing within a reasonable time after an accused has been deprived of his freedom.

In *Goldberg v. Kelly*, the Court summarized the test for providing procedural due process as follows:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 647, (1951) (Frankfurter J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. 254, 262-63, 90 S.Ct. 1011, 1017-18.

In this case the grievous loss is that of one's freedom and the countervailing governmental interest is that of the state in avoiding the burden of preliminary hearings. Although the state may incur additional expense in expanding its existing committing system to include hearings for direct information cases, this expense will be more than offset by the savings in jail and trial costs regarding those persons heretofore jailed and/or tried without probable cause. Moreover, these financial considerations are so grossly overbalanced by the prolonged loss of freedom by innocent persons that further comment is unnecessary.

The taxpayers of this community have labored under a near intolerable burden of the spiraling cost of combating crime. The expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community.

A preliminary hearing in direct information cases is compelled by the Fourth Amendment as well as by the Fourteenth Amendment.

The Fourth Amendment provides that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation. . . ". It has been established that this amendment is operable upon the states via the due process clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961) and that

it applies to arrest warrants as well as to search warrants. *Giordenello v. U.S.*, 357 U.S. 480, 78 S.Ct. 1245 (1958).

The existence of a Fourth Amendment right to a probable cause hearing has been recognized in two opinions of the Court of Appeals for the District of Columbia Circuit. In *Cooley v. Stone*, 134 U.S. App. D.C. 317, 414 F.2d 1213 (1969) the Court held that a juvenile in the custody of a detention home had the right to a probable cause hearing and cited approvingly the following language of the lower court:

> No person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. 414 F.2d at 1213.

In *Brown v. Fauntleroy*, 442 F.2d 838 (1971) the Court found that the same right applied to a juvenile released pending trial to the custody of his mother. In that opinion the Court emphasized that the basis of the right was in the Constitution and not in the Federal Rules of Criminal Procedure. Of the fact that the accused was not in physical state custody the Court said;

> "[T]he right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody. Appellant accordingly has the right to have the validity of the seizure determined since he will be called to trial for conduct which led to the seizure." 442 F.2d at 842.

Recently the Supreme Court overturned a State Court conviction based upon evidence seized under a search warrant issued by the state attorney general who was the chief investigator and prosecutor in the case. The warrant was held to be invalid under the Fourth and Fourteenth Amendments because not issued by the "neutral and detached magistrate required by the Constitution", *Coolidge v. New Hampshire*, 400 U.S. 814, 91 S.Ct. 2022 (1971). If a prosecuting official cannot properly issue a search warrant in a case he is prosecuting, then he is a fortiori not a proper person for determining the existence of probable cause to hold an accused for trial.

The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause.

Count II alleges that the system which denies a preliminary hearing to plaintiffs' class while granting a hearing to other criminal defendants is violative of the right to equal protection of the law. Because of the Court's holding that in all direct information cases the accused must be given a hearing as a right of due process and freedom from unreasonable seizure, it is unnecessary for the Court to determine whether the prior system was invalid for failure to afford equal protection of the law. *See Troy State University v. Dickey*, 402 F.2d 515 (5 Cir. 1968).

Plaintiffs contend in count III that where an accused is financially unable to post the required security for his release pending trial there exists an arbitrary and unreasonable classification based solely upon wealth in violation of the right to equal protection of the law. The record

establishes that it is the policy of defendants to set bonds sufficiently low to allow accused persons their release while assuring their subsequent appearance at trial. The severity of the crime along with the accused's ties to the community, past criminal record, and financial resources are all considered in the setting of bonds. There is no allegation that any bond in question was set in excess of that which the judicial officer deemed necessary to assure trial appearance.

In contending that they are denied release solely because of their poverty, plaintiffs ignore the other factors distinguishing them from released persons. The record shows that plaintiffs' confinement is not the result of a classification based solely upon wealth, consequently they have not been deprived of their right to equal protection of the law.

The Court recognizes the cooperative attitude of the state authorities and their desire to comply with the law. Obviously they are the individuals most qualified to develop the new procedures required by this order. It is hereby suggested that the assistance of Presiding Circuit Judge Marshall C. Wiseheart in the implementation of this this [sic] order would be helpful. It is therefore,

ORDERED and ADJUDGED:

1. That this is a valid class action brought pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of all persons arrested in Dade County who are or will be proceeded against by direct information of the state attorney.

2. The named plaintiffs shall immediately be given a preliminary hearing to determine probable cause for their arrest by a committing magistrate unless their cases have been otherwise concluded.

3. That defendants shall, within 60 days of the date hereof, submit to the Court a plan providing for preliminary hearings before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct information. The preliminary hearing shall be within a reasonable time of the arrest.

4. Subsequent to final hearing certain motions for summary judgment, severance and transfer of party defendants to party plaintiff were filed. These motions be and the same are hereby denied.

5. The Court retains jurisdiction for a consideration of the plan and enforcement of the provisions of this final judgment.

DONE and ORDERED in chambers at Miami, Florida, this 12th day of October, 1971.

JAMES LAWRENCE KING

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

[TITLE OMITTED]

ORDER ADOPTING PLAN TO PROVIDE PRELIMINARY HEARINGS

(Filed Jan. 25, 1972)

In its Opinion and Final Judgment in this cause entered October 12, 1971, the Court directed defendants to submit a plan providing for preliminary hearings before a judicial officer in all criminal cases in Dade County wherein prosecution is to be upon direct information of the State Attorney. A single plan having been submitted, that being on behalf of Defendant E. Wilson Purdy, and the Court having provided all parties with the opportunity for oral argument regarding said plan, it is

ORDERED AND ADJUDGED:

I. That the aforesaid plan, as modified by the Court, shall be the official plan for implementation of the Court's final judgment, said modified plan being as follows:

1. The purpose of this plan is to provide every arrested person (hereinafter defendant) who is to be proceeded against by direct information of the State Attorney immediate access to a committing Magistrate who shall conduct a first appearance hearing for the following purposes:

(A) To advise the defendant of the charges against him; (B) To advise the defendant of his rights under the Constitution of the United States

and the Constitution of the State of Florida; (C) To appoint counsel if the defendant is indigent; (D) To set a date and time for a preliminary hearing to determine whether there is probable cause that the defendant committed the offense with which he is charged.

2. All proceedings will be conducted pursuant to Florida Statutes, the Florida Rules of Criminal Procedure and the applicable case law.

3. All arrested persons who are subject to "booking" will be booked at the Metropolitan Dade County Jail.

4. All officers who make an arrest, with or without a warrant, shall immediately take the arrested person, or where that is not feasible cause him to be taken, before a Magistrate for a first appearance hearing. Absent extreme circumstances said hearing shall take place within three (3) hours of the time the defendant is taken into custody.

5. The Chief Judge for the Eleventh Judicial Circuit in and for Dade County shall designate sufficient Judges, who will sit as a committing magistrate division.

6. A committing magistrate will be available for first appearance hearings on a twenty-four (24) hour basis seven (7) days per week.

7. All first appearance hearings will be held in the courtroom or chambers of the designated committing magistrate.

8. At the first appearance hearing the magistrate will set the time and place for a preliminary hearing to determine whether there is probable cause to hold the defendant for trial. If both the State of Florida, represented by the office of the State Attorney, and the defendant, properly represented by counsel, are prepared to proceed with the preliminary hearing, the magistrate shall immediately conduct such a hearing. If either party is not prepared for the preliminary hearing said hearing shall not be set to take place within a period of twenty-four (24) hours after the first appearance hearing unless the parties agree to a time within that period. Except in extreme circumstances the preliminary hearing will be set to take place not more than four (4) days after the first appearance hearing for all defendants who are unable to post bond and do not qualify for the Pre-Trial Release Program and not more than ten (10) days after the first appearance hearing for all other defendants.

9. A defendant may waive his right to a preliminary hearing or agree to a hearing date that is later than the time hereinabove set forth, provided that such a waiver is signed by the accused and his legal counsel, if any.

10. There will be provided sufficient assistant state attorneys available at the first appearance hearing and at the preliminary hearing to assist officers in drafting the charges against the arrested person and to otherwise represent the position of the State of Florida at said proceedings.

11. There will be provided sufficient assistant public defenders to represent, both at the first hearing and at the preliminary hearing, those persons who are entitled to public representation.

12. The magistrate shall allow the defendant a reasonable time to obtain counsel and for such purposes shall, if necessary, postpone setting the preliminary hearing for a period not to exceed forty-eight (48) hours. He shall also, upon request of the defendant, require an officer to communicate a message to such counsel in Dade County as the defendant may name. The officer shall with diligence and without cost to the defendant perform that duty. If the defendant desires private counsel and private counsel cannot be obtained within a reasonable time the magistrate shall continue the cause and release the defendant on his own recognizance, in the custody of another or on bond, or the magistrate may order incarceration of the defendant. If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days. If the magistrate finds the defendant to be indigent, he shall appoint a public defender to represent him.

13. Upon information or complaint under oath the magistrate may arraign the defendant and may accept a plea of guilty or nolo contendere to any offense within the jurisdiction of the Court. If the charged offense is not within the jurisdiction of the Court the magistrate shall set a hearing for the purpose of accepting the plea before a Court with appropriate jurisdiction.

14. Preliminary hearings may be held in any court of competent jurisdiction, such location is to be set by the magistrate at the time of the first appearance hearing.

15. The magistrate, where he has appropriate jurisdiction, may, upon appropriate plea, sentence any defendant either at the first appearance or at the preliminary hearing.

16. If, at the time of the preliminary hearing, it appears to the magistrate that there is probable cause that an offense has been committed and that the defendant committed it, the magistrate shall forthwith order the defendant to answer to the Court having trial jurisdiction; otherwise the magistrate shall discharge the defendant.

17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge.

18. If the magistrate orders the defendant to answer to the Court having trial jurisdiction, he may release the defendant on his own recognizance, in the custody of another, or on bond, or he may order the defendant to be incarcerated. For purposes of the preliminary hearing the magistrate shall issue such process as may be necessary to secure the attendance of witnesses within the state for the state or the defendant. All witnesses shall be examined in the presence of the defendant and may be cross examined. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf and in such a case he shall be warned in advance by the magistrate that anything he may say can be used against him at a subsequent trial. He may be cross examined and whether he testified or not any witness produced by him shall be sworn and examined.

Prior to the examination of any witness in the cause the magistrate may, and on request of the defendant shall, exclude from the courtroom all other witnesses who have not yet testified. The magistrate may cause the witnesses

to be kept separate and prevented from communicating with one another until all are examined.

At the request of the prosecuting attorney or the defense attorney the testimony of the witnesses and the defendant, if he testified, shall be recorded verbatim stenographically or by mechanical means and shall be transcribed and furnished to the requesting attorney. If the testimony or any part thereof is transcribed at the request of either party, a copy of such testimony shall be furnished at cost to the other party. If the defendant is indigent, transcriptions shall be furnished free of cost upon request by the defense attorney.

When the magistrate has discharged the defendant or held him to answer he shall transmit within forty-eight (48) hours thereafter to the clerk of the court having trial jurisdiction of the offense the following information as applicable:

(a) The name of the incarcerated person awaiting trial, the date of incarceration and the charge.

(b) The complaint and the warrant.

(c) The written testimony of the witnesses if transcribed and filed.

(d) The recognizance or undertaking for the apperance of the defendant.

(e) A copy of the order discharging or holding the defendant.

(f) Every article, writing, money or other exhibits received in evidence provided, however, that such article, writing, money or other exhibits so used in evidence before said magistrate may be returned to the owner thereof upon a written order of the magistrate unless the State objects thereto in which case the trial Court will resolve the issue.

19. The following sanctions shall be imposed for failing to bring the defendant before a committing magistrate and/or for failure to hold a preliminary hearing:

(1) If, within twenty-four (24) hours after a defendant's arrest, a first appearance has not been held and/or a magistrate has not set bail for a defendant charged with an offense bailable as of right, the defendant shall immediately be released on his own recognizance.

(2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal.

Postponements may be granted in accordance with the Florida Rules of Criminal Procedure after notice to the parties and an opportunity to be heard.

20. In case of conflict between this plan and applicable Florida Statutes, Florida case law, or the Florida Rules of Criminal Procedure the three last mentioned authorities will apply to the extent that they are not inconsistent with the Court's Opinion and Final Judgment of October 12, 1971.

21. In order to accomplish the purposes of this plan the details herein may be altered as required to keep the system functioning without further approval by this Court.

22. This plan is not intended to apply to violations charged under the various municipal codes.

23. Each law enforcement agency will be responsible for the transportation of its own prisoners and it is not anticipated that this is a responsibility of Metropolitan Dade County.

24. This plan shall be put into effect within ninety (90) days from the date of this order.

II. The Motion of Defendant Gerstein for Rehearing and/or Clarification be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Florida this 25 day of January, 1972.

s/ James Lawrence King

James Lawrence King
UNITED STATES DISTRICT JUDGE

[TITLE OMITTED]

FINDINGS AND CONCLUSIONS RELATIVE THE COMMITTING MAGISTRATE SYSTEM OF DADE COUNTY, FLORIDA

I

HISTORY

This action brought almost two years ago by Florida prisoners held for trial without ever having received an impartial judicial determination of probable cause for their detention, now comes before the court for detailed findings on the extent to which present state practice falls short of meeting constitutional requirements. In an order of October 12, 1972, this court initially ruled that both the fourth amendment and the due process clause of the fourteenth amendment require a prompt hearing before a neutral and detached judicial officer for individuals held for trial solely upon an information filed by a single state attorney. *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D.Fla. 1971).

The court allowed defendants both before and after that ruling an opportunity to voluntarily bring Florida practice into compliance with basic constitutional standards. After this case was initiated on March 22, 1972, the court permitted the pre-trial schedule to be protracted in order that the 1971 Florida Legislature might have an opportunity to consider and act upon the issue. Likewise, the court's October 25 order postponed the question of implementation to provide all defendants 60 days within

which to avail themselves of the opportunity to submit proposals concerning what sort of system for providing prompt preliminary hearings by an impartial judicial officer should be adopted in Dade County, Florida. The only proposal submitted in response to the court's mandate, (which came from defendant E. Wilson Purdy, Sheriff of Dade County) suggested the creation of a committing magistrate system.[1] In the absence of alternative proposals, the Purdy Plan, as it came to be known, was substantially adopted on January 25, 1972 after careful deliberation by the court. *Pugh v. Rainwater*, 336 F.Supp. 490 (S.D.Fla. 1972).

Implementation of the Purdy Plan was delayed at the request of defendants for 90 days to permit adequate time for necessary administrative arrangements. State Attorney Gerstein's subsequent request that the court further delay compliance, pending completion of an appeal, was denied. The Fifth Circuit Court of Appeals granted the requested stay by order of March 31, 1972.

Despite the Fifth Circuit stay, the Dade County judiciary officials moved voluntarily in the hiatus during appeal to establish their own plan for providing preliminary hearings. To effectuate this court's implementation order, a Committing Magistrate Rules Committee was formed by administrative order of Chief Judge Marshall C. Wiseheart of the Eleventh Judicial Circuit of Florida on March 13, 1972. After the stay had been issued, however, the work of the committee independently bore fruit as an administrative order of the Chief Judge created a committing magistrate system on April 15, 1972, which

[1]Defendant State Attorney Gerstein adopted Sheriff Purdy's plan, while reserving his right to pursue appellate remedies.

provided a limited right to a preliminary hearing. Although the requirements of the Dade County Magistrate System did not entirely conform with those of this court's order or those of the Purdy Plan, the differences are now moot in view of subsequent developments.[2] In retrospect, it is only unfortunate that in spite of our efforts to secure alternative proposals, the court did not have the opportunity to consider the plan actually implemented.

The signal development, however, came with the issuance of Amended Rules of Criminal Procedure by the Florida Supreme Court on December 6, 1972. The Amended Rules, which took effect February 1, 1973, contain many of the safeguards contained in this court's plan of January 25, 1972, including provision for preliminary hearings under a committing magistrate system. The State Supreme Court has once again demonstrated that it is not blind to the continued violation of 40-year old state statutes requiring an arresting officer to take the defendant before a committing magistrate *without unnecessary delay*. Fla. Stat. §§901.06 901.23 (1971) (originally enacted as Law of June 12, 1939, ch. 19554, §§6, 23 [1939] Fla. Laws 1300); see e.g. *State ex rel. Carty v. Purdy*, 240 So.2d 480 (Fla. 1970); *Milton v. Cochran*, 147 So. 2d 137 (Fla. 1962).

Upon hearing oral argument on October 18, 1972, in the appeal, the Fifth Circuit entered an order of October 24, vacating its stay of our January 25, 1972 order, directing this court to make specific findings on the constitu-

[2]It should be noted; although defendant State Attorney Gerstein acquiesced in the committing magistrate system, he reserved the right to continue to file direct informations with the Clerk of the Criminal Court of Record.

tional deficiencies of present practice, and authorizing the implementation of the Purdy Plan.[3] In accordance with that mandate, a hearing was set for November 16, 1972, but delayed at the request of defendants until January 18, 1973. On the basis of the presentations of the parties and amicus curiae Dade County Bar Association at that hearing, the following findings of fact and conclusions of law are hereby entered.

The parties agreed and stipulated to the premise, in which the court concurs, that the mandated assessment of present practices must concern itself with state procedures after February 1, 1973, under the Florida Rules of Criminal Procedure as now amended. The parties further agreed and stipulated that, so viewed, only four aspects of present practice differ from the court's plan of January 25, 1972, and remain to pose issues of constitutional dimension in this case.

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[3]The Fifth Circuit order stated:

"[I]t is now

"ORDERED that the stay order heretofore entered is hereby VACATED.

"It having been made to appear on oral argument that with with substantial acquiescence of the Attorney General of the State of Florida, measures have now been instituted to afford some of the relief relating to hearings to determine probable cause for arrest of members of the class represented by named plaintiffs, the trial court is directed to compare in detail the plan incorporated in its order with the present practice, and make specific findings in which it determines to what extent the present practice falls short of meeting constitutional requirements. A copy of its findings shall be furnished to counsel and to this court.

"Pending the completion of such inquiry, the trial court may put into effect such parts of its plan as are consistent with the proposed plan submitted to the court by Sheriff Purdy."

II

THE PRESENT PRACTICE WHICH PERMITS THE STATE ATTORNEY TO FILE AN INFORMATION AND OBVIATE THE REQUIREMENTS OF A DETERMINATION OF PROBABLE CAUSE BY A NEUTRAL AND DETACHED MAGISTRATE DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Rule 3.131(a) of the Florida Rules of Criminal Procedures states:

> "A defendant, *unless charged on an information* or indictment has the right to a preliminary hearing on any felony charge against him.

The Rule is consistent with the longstanding law of Florida. *State ex rel. Hardy v. Blount*, 261 S.2d 172 (Fla. 1972).

The validity of this practice, which permits the State Attorney to be the sole arbiter of probable cause, has always been the main issue in this case.

Not only does the present practice permit the State Attorney to block a preliminary hearing, it also allows him to overrule a determination of no probable cause made by a magistrate by refiling an information. Therefore the whole preliminary hearing system is really conditioned upon the desires of the State Attorney. If he

files an information prior to the preliminary hearing, none will take place. If he files an information after a magistrates detached and impartial determination of no probable cause, the accused may remain in jail until trial.

This practice cannot be reconciled with the constitutional requirement of the due process clause of the fourteenth amendment and the fourth amendment. The continuation of the practice is in clear conflict with the plan previously entered by the court and with the original decision of the court.

In addition to the cases relied upon in that decision (at 336 F.Supp. 1107 et. seq.), recent Supreme Court decisions confirm that the deprivation of liberty caused by the prosecuting attorney without any judicial review is unconstitutional. See: *Morrissey v. Brewer*, ——— U.S. ——— 92 S.Ct. 2503 (June 29, 1972); *Fuentes v. Shevin*, 92 U.S. 1983 (June 12, 1972; *Stanley v. Illinois*, —— U.S. ———, 92 S.Ct. 1208 (April 3, 1972); *Shadwick v. City of Tampa*, —— U.S. ——, 92 S.Ct. 2119 (June 19, 1972), and *United States v. United States District Court*, —— U.S. ———, 92 S.Ct. 2125 (June 19, 1972).

III

THE PRESENT PRACTICE WHICH EXCLUDES MISDEMEANANTS FROM A PRELIMINARY HEARING DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Rule 3.131(a) of the Florida Rules of Criminal Procedure, as amended, authorizes hearings before a neutral

and detached judicial officer only "on any felony charge." Thus, misdemeanants need not be afforded a preliminary hearing under the present practice, despite the fact that the preliminary hearing provisions of the amended rules provide the only guarantee of prompt determinations of probable cause. Consequently, the accused misdemeanant remains unprotected by present practices against deprivation of his liberty. As the court's original opinion made clear, this deprivation of liberty is particularly unjustifiable as a denial of due process for those misdemeanants who remain in custody without bond. *Pugh v. Rainwater*, 332 F. Supp. 1107. (S.D.Fla. 1971); cf. *Morrissey v. Brewer*, —— U.S. ———, 92 S. Ct. 2593 (1972). The court's plan to effectuate its original order, as well as the proposal of Sheriff Purdy, therefore made no distinction between felony cases and misdemeanors.

However, it is well-settled that "once it is determined that due process applies, the question remains what process in due." *Morrissey v. Brewer*, 92 S.Ct. 2593 2600 (1972) and that the process due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurther J., concurring), quoted in *Goldberg v. Kelley*, 397 U.S. 254, 263 (1970).

Although we think it clear that the deprivation to misdemeanants held in custody unable to meet their bond requires a prompt neutral probable cause determination, the question becomes more difficult as applied to misdemeanants out on bond and those who are charged with violating county ordinances which carry no penalty of imprisonment. We have therefore taken our cue from the Supreme Court in *Argersinger v. Hamlin*, 92 S.Ct. 2006

(1972) and concluded that a neutral determination of probable cause is required by the fourth amendment for all misdemeanants who face potential imprisonment.

However, we are unable to conclude that either due process or the fourth amendment requires a probable cause determination by a judicial officer for those misdemeanants accused of violations which carry no possible imprisonment. *See Shadwick v. City of Tampa.* We think that misdemeanants within this category can properly be screened by a State Attorney for the very reason that his office is not fundamentally concerned with the prosecutions of the barking dog variety, but screens them as a general rule at the request of complaining citizens.

Thus, the State Attorney may not constitutionally obviate preliminary hearings where a potential term of confinement faces the misdemeanant.

The present practice, as embodied in the amended rule, suffers from an additional shortcoming. It creates a classification, based solely on the type of offense, which deprives accused misdemeanants, but not accused felons, of a right long recognized as "fundamental": the right not to be deprived of liberty without due process of law and consistent with the fourth amendment. Thus, although classification of crimes is ordinarily a matter left largely to the states, this categorization touches upon a right "that the court has come to regard as fundamental and that demand[s] the lofty requirement of a compelling governmental interest" to justify it. *In re Kras*, 41 U.S.L.W. 4117, 4121 (January 10, 1973), citing *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

Two such state interests were advanced by defendants with the voluntary cooperation and testimony of the Hon. John A. Tanksley, Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit, as sufficiently compelling to justify the classification. First, the state's interest in assuring misdemeanants a fair and impartial trial. Judge Tanksley testified that Justice Adkins of the Florida Supreme Court wished to inform the court that although the advisory committee which formulated the amended rules had recommended that preliminary hearings be afforded misdemeanants, the Florida Supreme Court had demurred from so providing because of its concern that the same magistrate who determined probable cause in a misdemeanor case might end up trying that very case thereby denying the defendant a fair and impartial trial. Although the state's interest in providing fair and impartial fact-finders is doubtless both a laudable and compelling one, Judge Tanksley went on to testify that preliminary hearings and misdemeanor trials are conducted by separate panels of judges under the present practice in Dade County. While he could not speak for practice in the remainder of the state, we are not in this suit faced with practices outside Dade County.

The second compelling interest suggested by defendants was that of expense to the state to provide preliminary hearings for misdemeanants. Judge Tanksley testified that if the five Dade County judges assigned as magistrates were to provide preliminary hearings for misdemeanors as well as felonies their caseload might increase by as much as 30 to 35,000 cases a year, or approximately 3,000 a month. He acknowledged, however, that these projections represented an upper limit, and that figure might be considerably reduced in practice due to waivers of preliminary

hearings and guilty pleas. He also acknowledged that a large part of the misdemeanor caseload consists of county penal violations, formerly heard by justices of the peace, which are now classified as misdemeanors as a result of the state court reorganization act. He characterized these as the "barking dog" and "loud parties" cases. Since these cases, which do not involve potential imprisonment, are not affected by the court's order, we conclude that the increase in the magistrate's caseload from providing preliminary hearings to misdemeanants who face potential imprisonment will fall considerably short of Judge Tanksley's projection and, if substantial, will not be overly burdensome. The court, concludes, however, that while more magistrates as well as courtroom facilities may be needed as a result of our order, and that costs may increase in the short run, it will not be a significant increase.

Judge Tanksley also testified, however, that despite dark predictions to the contrary by defendants at the time of this court's initial order, the magistrate's system has been highly successful in felony cases. He estimated that, as a result of the magistrate system, felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County. We are pleased to learn that there is now evidence to support our prediction that

> "[t]he expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community," 332 F.Supp. at 1114.

Although we acknowledge that a state has a proper interest in maintaining its fiscal integrity and may legitimately attempt to limit its expenditures, it is well settled that a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. *Shaprio v. Thompson*, 394 U.S. 618, 633 (1969). In the case before us, defendants must do more than show that denying due process to misdemeanants will save money. In the absence of other suggestions of compelling interests, we must conclude that present practice deprives misdemeanants of equal protection of the law, in addition to due process and fourth amendment guarantees.

IV

THE PRESENT PRACTICES WHICH PROVIDE DIFFERENT TIMES FOR PRELIMINARY HEARINGS FOR THOSE CHARGED WITH CAPITAL OFFENSES OR OFFENSES PUNISHABLE BY LIFE IMPRISONMENT DIFFER FROM THE COURT'S PLAN AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THE FOURTH AMENDMENT.

Rule 3.131(b) of the Florida Rules of Criminal Procedure provide:

> "In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 72 hours of the time of the defendant's first appearance. *In all capital offenses and*

offenses punishable by life imprisonment and in all cases where the defendant is not in custody *the preliminary hearing shall be held within seven days of the time of defendant's first appearance.*" (emphasis added).

The present practice, as set forth in that rule, differs from the courts' plan and Sheriff Purdy's plan only insofar as it excludes the two enumerated categories of offenses from the established time frame of four days.[4]

By creating a separate classification for persons accused of capital offenses or offenses punishable by life imprisonment, the practice suffers an equal protection infirmity similar to that caused by the total exclusion of misdemeanants from a preliminary hearing. The court finds no compelling governmental interest which justifies the classification. cf. *In re Kras, supra*, and *Shaprio v. Thompson, supra.*

By failing to set the same time requirements for capital and life imprisonment cases as compared to other felonies, their present practice condones an extended deprivation of liberty without a hearing.

The timeliness of the preliminary hearing has been a constant concern of this court. The court recognizes that tolerating a deprivation of liberty for four days, absent a judicial determination of probable cause, is questionable.

[4]The court plan had required initial appearance within three hours of arrest and preliminary hearing within four days thereafter. The new Florida Rules require initial appearance within 24 hours, and preliminary hearing 72 hours (3 days) thereafter. Thus the crucial time of preliminary hearing is hastened by three hours under the Florida Rules, except for the persons falling into the classification set forth above.

In *Argensinger v. Hamlin*, 407 U.S. 25 (1972) the court prohibited a denial of liberty for one day absent counsel. Here we are condoning a denial of liberty for four days absent a hearing. Property rights have consistently been protected by a hearing prior to the taking. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Thus, while four days may be a reasonable time to allow witnesses to be summoned and other mechanical tasks performed, an eight day (24 hours for initial appearance plus seven days) deprivation of liberty is not reasonable. For the reasons set forth in the original *Pugh v. Rainwater* decision and upon the recent decisions of the Supreme Court cited *infra*. The court finds that the present practice of not setting the same time requirement for all persons who will be proceeded against by information violates the fourth and fourteenth amendments.

V

THE FAILURE OF THE PRESENT PRACTICE TO PROVIDE SANCTIONS FOR FAILURE TO CONDUCT THE PRELIMINARY HEARING AND THE REFILING OF AN INFORMATION IF A DEFENDANT IS DISCHARGED DIFFERS FROM THE COURT PLAN AND RESULTS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

The present practices provide no sanction for the failure to accord a preliminary hearing or for the refiling of an information after determination of no probable cause. They do not, because Florida law tolerates the use

of the information process in lieu of a probable cause determination by a neutral and detached magistrate. Rule 3.131(a), Florida Rules of Criminal Procedure. The court plan did contain sanctions. If a preliminary hearing was not accorded within the time period set and there was not a waiver or proper postponement, then the defendant was to be discharged and the charges withdrawn. However they could be refiled, but if the preliminary hearing was not accorded thereafter, then the defendant was to be discharged and not held again to answer except upon an indictment returned within 30 days of the second withdrawal. *Pugh v. Rainwater*, 336 F.Supp. at 493. If a magistrate made a determination of no probable cause and discharged the defendant, the defendant could not be recharged except upon a grand jury indictment returned within thirty days of the discharge. *Pugh v. Rainwater*, 336 F.Supp. at 492.

The Court of Appeals requested this court to make specific findings to determine the extent to which the present practice is constitutionally invalid. The failure to provide sanctions is not, of itself, an unconstitutional infirmity. It is the failure to accord probable cause hearings, which offends the Constitution. Thus, the lack of sanctions is invalid only insofar as the failure to provide sanctions results in a system which tolerates the denial of, or overruling of, a preliminary hearing. This is a corollary of the very first finding made above.

The courts, for far too long, have been blind to what all others see. We have operated under a conceptualism which no longer corresponds to the reality in many parts of the nation as increasingly crowded criminal dockets. [sic] The hard fact is that in many of our overburdened judi-

cial systems state as well as federal, it may be a matter of weeks before even direct informations are filed, as was the situation in Dade County when this suit was brought, and a matter of months before the accused is brought to trial. In the interim, those unable to post bail suffer what can only be understood as a grave deprivation of liberty, however it may be theoretically justified.

Therefore the court finds that the failure of the present practice to provide a remedy for the denial of a preliminary hearing or the overruling of a preliminary hearing by use of the information process, insofar as that failure tolerates and condones such denials or overrulings, results in a violation of the fourth and fourteenth amendments. See the cases cited in *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D. Fla. 1971) and the more recent cases of *Morrissey v. Brewer*, *Fuentes v. Shevin*, *Stanley v. Illinois*, *Shadwick v. City of Tampa*, and *United States v. United States District Court*, supra, which fully support the proposition that the taking of a person's liberty absent a hearing by a neutral and detached magistrate, is unconstitutional.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 16 day of February, 1973.

JAMES LAWRENCE KING
UNITED STATES DICTRICT
JUDGE

[TITLE OMITTED]

June 1, 1973

TO ALL COUNSEL OF RECORD

No. 72-1585 — Pugh v. Rainwater

Gentlemen:

The Court has directed that this letter be sent.

A hurried reading of Judge King's memorandum order and opinion of February 16, 1973 (filed with this Court on March 12, 1973) indicates to the Court that he has, in response to our previous order of October 24, 1972, and in accordance with a stipulation by the parties as to the effect of the promulgation of the new Florida Rules of Criminal Procedure on the pending appeal in the Fifth Circuit, undertaken to rule specifically on four aspects of the new rules:

(i) that insofar as Rule 3.131(a) still authorizes the incarceration of a person against whom an information has been filed without a probable cause hearing by a detached magistrate, it violates due process;

(ii) that the failure of the Rules to provide a probable cause hearing for misdemeanants denies that class of people both due process and equal protection;

(iii) that the allowance of different periods of delay prior to the probable cause hearing for those accused of felonies for which a life sentence could be imposed (7 days) than for those for whom a shorter limited period of imprisonment would be the maximum (3 days) denies those subject to the longer period of delay due process and equal protection; and

(iv) that insofar as the failure of the Florida Rules to provide explicit remedies for failure to comply with the requirements imposed by the holding as to (i) above sanctions or encourages the incarceration of defendants without a probable cause hearing it results in a violation of the Fourth and Fourteenth Amendments.

In order that the Court may have a full and proper understanding of the issues which it must now resolve in light of the changed factual circumstances in the Florida practice, the stipulation by the parties as to the effect of these changes on this case, and the subsequent opinion of Judge King of February 16, 1973, the Court directs counsel to file within 7 days from the receipt of this communication typewritten memoranda addressing themselves to the following issues as well as any not specified but which in counsel's opinion are related and significant.

First, to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490? [sic] Specifically, assuming that the declaratory provisions of Judge King's supplemental order of February 16, 1973, are sustained by this Court on appeal, to what extent are the very

specific provisions of his prior decree either necessary or desireable? In this regard counsel should include with their memoranda a proposed order and decree which this Court could direct the District Court to enter dealing specifically with their contentions. This should be constructed so that each of the principal issues outlined are separately stated to permit ready adaptation depending on which, if any, of the holdings are sustained. Since this is so requested on the hypothesis that each is sustained, the Court is hopeful that all counsel could join in a proposed decree or at least indicate differences specifically. With the proposed decree(s) with explanatory memoranda the Court will be able to determine the extent to which the decree to be mandated should or must contain definitive details as to mechanics, sanctions, and the like.

Second, our hurried consideration of the supplemental order raises some concern that there are no parties before the Court with standing to raise the equal protection issues treated in parts (ii) and (iii), *supra*, of Judge King's supplemental order. Are there any accused misdemeanants threatened with loss of liberty by the operation of the new Florida Rules before the Court? Are there any parties to this litigation who are accused of felonies which could result in a life sentence and who are substantially affected by the operation of the new Florida Rules so as to have standing to assert the claim that the longer period of delay violates equal protecion?

Third, and in a more general sense, to what extent does the supplemental opinion and the stipulation of counsel alter, reduce or eliminate one or more or all of the objections or attacks made on the District Court's initial opinion and detailed decree which were the subject of this

appeal as submitted on oral argument? In summary, just what if anything is left of this appeal?

The Court appreciates the continued cooperation of counsel. The memoranda are to be filed in clear typewritten copies, one to the Clerk, one copy to each of the Judges at his home station. These may be filed simultaneously with the privilege of replies, rejoinders, etc., as thought helpful.

Very truly yours,

/s/ Edward W. Wadsworth,

EDWARD W. WADSWORTH,
Clerk

cc: Honorable John R. Brown, Chief Judge
U.S. Court of Appeals
11501 U.S. Courthouse, 515 Rusk Ave.
Houston, Texas, 77002

Honorable Elbert P. Tuttle
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[TITLE OMITTED]

JOINT MEMORANDUM IN RESPONSE TO COURT'S LETTER OF JUNE 1, 1973

(Filed June 8, 1972)

Pursuant to the Court's letter of June 1, 1973, counsel for the plaintiffs, the amicus curiae and the State Attorney conferred and jointly submit this response to the Court.[1]

The Court asked this question: "In summary, just what if anything is left of this appeal?" The parties and amicus curiae all agree that the major substantive legal issue remains intact. That issue is:

> DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?

The State Attorney's unequivocal position is, and has always been, that an information filed by him or one

[1]Mr. Barry Richard, Assistant Attorney General, was unavailable for consultation. However Mr. Richard's concern in this case has been with the bail issue posed in the companion matter, No. 72-1223. Mr. Mellon, from the State Attorney's office has been solely responsible for the preliminary hearing issues which were the subject of the Court's letter. Mr. Mellon is a signatory to this memorandum.

of his assistants is sufficient to determine probable cause and that the filing of an information obviates any right to a preliminary hearing before a judicial officer. That position is consistent with present and past Florida law. It is that issue which has been at the heart of this suit since its inception. If the Court inferred from Judge King's February 16, 1973, order that that controversy was stipulated away, it was mistaken. The plaintiffs and the amicus curiae agree that the issue posed is alive, and a continuing dispute.

* * * *

The Court asked: ". . . to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490?" and ". . . to what extent are the very specific provisions of his prior decree either necessary or desireable?"

The order at 336 F.Supp. 490 sets forth the procedures for implementing the substantive decision reported at 332 F.Supp. 1107. Given the plan instituted by the County and the new Florida Rules of Criminal Procedure, the parties agree (except as to two points set forth below) that the February 16, 1973, order does, in effect, supersede the mechanical plan. In other words, except in the two areas designated below, if the declaratory provisions of Judge King's February 16 order are sustained, there is no longer any need for this Court to issue an order detailing how a committing magistrate system must work.

The parties also agree that the February 16, 1973, order restates and amplifies the original order at 332 F.Supp. 1107.

* * * *

The two areas referred to above are these: (1) the time between arrest and preliminary hearing and (2) the sanctions.

(1) Judge King's order held: "If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days [of initial appearance]." 336 F.Supp. at 492. In his February 16 order Judge King noted that the new Florida Rules mandate preliminary hearing within 72 hours, or 3 days of initial appearance.[2] That appearance is required within 24 hours of arrest.[3] Thus the total time lapse between arrest and preliminary hearing appeared to Judge King to be 4 days, which would have been consistent with his previous order.

However, Rule 3.040 of the Florida Rules of Criminal Procedure states:

> "When the period of time prescribed or allowed shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Thus a six day lapse is tolerated. The plaintiffs and the amicus curiae believe that a four day lapse between arrest and determination of probable cause is the constitutionally tolerable maximum. Since due process usually requires a hearing *prior* to the taking of property or liberty, it is argued that a *subsequent* hearing must occur within the shortest possible time.

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[2]Rule 3.131(b), Florida Rules of Criminal Procedure.

[3]Rule 3,130(b)(1), Florida Rules of Criminal Procedure.

The State Attorney believes, inter alia,[4] that clerical or logistical needs, and laboratory analysis time in narcotics cases, necessitate the current time frame. Plaintiffs rejoinder is that more personnel should be hired.

• • • •

(2) The State Attorney does not agree with plaintiffs and amicus curiae regarding sanctions. The State Attorney's position is set forth in his supplemental letter.

The relevant sanction provisions of Judge King's original order were:

> "17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge."

336 F.Supp. at 492.

> "19 . . . . (2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal."

336 F. Supp. at 493.

[4]The State Attorney is filing a supplemental letter to elaborate on his position regarding this point and the sanction issue.

Plaintiffs and amicus curiae agree that if the Court finds for the plaintiffs the sanctions set forth above are appropriate.

• • • •

In its letter, the Court asked for proposed orders and decrees with regard to the specific enforcement provisions. Since this memorandum has hopefully made it clear that only two areas need be addressed in that regard, undersigned counsel for plaintiffs and amicus curiae respectfully take the liberty of making those proposals within this memorandum.

As to sanctions, the plaintiffs and amicus curiae urge that the District Court be directed to enter a fresh order imposing the sanctions quoted above after discharge by a magistrate and for failure to provide preliminary hearings.

As to the appropriate time for preliminary hearings, plaintiffs and amicus curiae submit that this Court should, after it makes it substantive Fourth and Fourteenth Amendment conclusions, order:

> "That persons arrested and incarcerated shall be given a judicial hearing to determine probable cause within four (4) days from the time of their arrest.[5]

[5]For those persons not in custody, Florida Rule of Criminal Procedure 3.131(b) provides that the preliminary hearing be held within seven days of first appearance. Plaintiffs and amicus curiae have no objection to that time period.

The State Attorney objects to the four day period for the reasons mentioned above and those set forth in the supplemental letter to be filed by the State Attorney.

• • • •

The Court asked if the plaintiffs have standing to raise the equal protection issues relating to misdemeanants and felons charged with offenses carrying life sentences. All parties agree that plaintiffs have standing. Plaintiff Robert Pugh was charged with robbery (App. p.2) a crime which was, and is punishable by life imprisonment. Plaintiff Nathaniel Henderson was charged with assault and battery (App. p. 19) which was, and is, a misdemeanor under Florida law. Both the original and intervening complaints were brought as class actions on behalf of all persons arrested by law enforcement officers in Dade County who are detained solely upon a direct information (App. 3, 40) and the Court below found that method of litigation to be appropriate. 332 F.Supp. 1107 at 1115.

• • • •

The undersigned counsel for the named parties respectfully submit this memorandum.

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/s/ Peter L. Nimkoff

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Dade County Bar Association

WE HEREBY CERTIFY that a true and correct copy of the foregoing Joint Memorandum in Response to Court's Letter of June 1, 1973, was mailed this 7th day of June, 1973, to BARRY RICHARD, Asst. Attorney General of Florida, State Capitol, Tallahassee, Florida.

By /s/ Bruce S. Rogow

Bruce S. Rogow

[TITLE OMITTED]

ORDER OF DISMISSAL

This action came on before the court upon plaintiff's motion for a preliminary injunction. The court, having considered the record and being fully advised in the premises, finds and concludes that the action must be dismissed for lack of jurisdiction. Plaintiffs seek what amounts to a temporary injunction of a pending state court proceeding, but entirely fail to allege such bad faith and harrassment as would justify federal intervention in a state criminal proceeding. *Younger v. Harris*, 401 U.S. 37 (1971). The only other basis upon which this court could conceivably have jurisdiction results from our decision in *Pugh v. Rainwater*, 332 F.Supp. 1107 (D.Fla. 1971). [sic] But even if plaintiffs could make a showing that they are entitled to relief as members of the class protected by the *Pugh* decision, the present posture of that case forecloses such a result. Implementation of the Purdy Plan, which provided for preliminary hearings, was ordered by this court on January 25, 1972, *Pugh v. Rainwater*, 336 F.Supp. 490 (S.D. Fla. 1972), but was stayed by the Fifth Circuit pending appeal. By order of October 25, 1972, the Fifth Circuit directed this court to make specific findings on the constitutional deficiencies of present practice, and authorized the implementation of the Purdy Plan. In complying with the Fifth Circuit's directive with findings of fact and conclusions of law issued February 16, 1973, this court declined to order immediate implementation of the Purdy Plan, pending resolution of the

direct information issue on appeal. Thus, defendants in the above-styled action are now under no duty to provide preliminary hearings, except as such a duty may be imposed by state law, as plaintiffs allege. Plaintiffs proper remedy for any state law violations lies, of course, in appeal to the state courts. Therefore, it is,

ORDERED and ADJUDGED that the above-styled action be and the same is hereby dismissed.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 20th day of March, 1973.

JAMES LAWRENCE KING

JAMES LAWRENCE KING
United States District Judge

cc: Jack Nagley, Esq.
Hon. Dan Satin
Hon. Ellen Morphonios Rowe
Hon. Richard Gerstein

RECORD ON APPEAL PAGE 505

Appellant Gerstein's Motion For Summary Judgment, etc.

The undisputed facts in this case are as follows:

1. The Plaintiffs have both been charged with violations of the Florida Statutes.

2. They have been charged by Information (which Informations are attached to the Complaint as Exhibits A and B), as permitted by Article I, Section 15(a) of the Florida Constitution.

3. That prior to the filing of the Information there was no Preliminary Hearing.

4. That the Informations were filed by the Defendant-Gerstein, or by one of his duly appointed Assistant State Attorneys, under and by his authority.

5. It is the policy and practice of the Defendant-Gerstein, his agents, servants and employees to file Informations based on independent examination of the facts, notwithstanding the result of any Preliminary Hearing, if any, and notwithstanding that there has been no Preliminary Hearing.

6. It is the policy and practice of the Defendant-Gerstein, his agents, servants, and employees to resist any attempt to have Preliminary Hearing after an Information has been filed or an indictment has been found.

FILED
OCT 10 1973
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972
No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

-vs-

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF *AMICUS CURIAE* (STATE OF FLORIDA) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

ROBERT L. SHEVIN
Attorney General

RAYMOND L. MARKY
Assistant Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

The Capitol Bldg.
Tallahassee, Florida

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972
No. _____

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

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-vs-

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF *AMICUS CURIAE* (STATE OF FLORIDA) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

Comes now the State of Florida, by and through its Attorney General, and files its brief *Amicus Curiae* in the above-styled cause on behalf of Petitioner.

Amicus adopts *in toto* the position taken by Petitioner in the brief heretofore filed in this Court, and in addition thereto advances additional matters

demonstrating the existence of several substantial federal questions which only this Court can authoritatively resolve.

REASON FOR GRANTING WRIT

The Decision Below Is Erroneous In That It Holds That The Fourth And Fourteenth Amendments To The Constitution of The United States Require A State To Provide Preliminary Hearings Before Judicial Officers For All Defendants Incarcerated Awaiting Trial Upon Informations Filed By A State Attorney And Thus Presents An Important Question Of Federal Constitutional Law And The Decision Conflicts With Applicable Florida Law And With The Decisions Of This Court And Of Other Courts Of Appeal.

The United States Court of Appeals, as well as the District Court, held that the Fourth and Fourteenth Amendments affirmatively require that arrestees held for trial upon informations filed by the state attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay, in effect declaring Rule 3.131(a), Florida Rules of Criminal Procedure, unconstitutional, for said Rule dispenses with preliminary hearings to a defendant charged in an

information or indictment, subsection (b) seemingly to the contrary notwithstanding.

The State of Florida respectfully suggests that such a ruling clearly presents a substantial federal question for the ruling directly affects the entire criminal justice system of the State of Florida. *Amicus* adopts the argument advanced by Petitioner on pages 7 through 13, as clearly presenting the conflict between the case *sub judice* and the cases heretofore decided by this Court.

There is another reason why this Court should treat the issue as one of federal importance, and that is that the decision of the Court of Appeals, if allowed to stand, would have the effect of negating the Rules of this very Court as amended in 1972. Indeed, Rule 3.131(a) was framed in light of this Court's Rule 5, Federal Rules of Criminal Procedure, subsection (c) of which provides:

> "(c) Offenses Not Triable by the United States Magistrate.
>
> * * *
>
> "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the

> defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. * * *." [Emphasis Supplied]

The underscored portion of this Court's rule makes it clear beyond any doubt that if he is indicted or informed against prior to the scheduled date of the preliminary examination, said examination is dispensed with. That is exactly what Rule 3.131(a), Florida Rules of Criminal Procedure, does. Subsection (b) is inapplicable when either of those two events occur; a fact the Court of Appeals either overlooked or misunderstood.

The State of Florida is curious to know how it can be said that Florida's rules dispensing with the preliminary hearing violate the fundamental concepts of the Fourth and Fourteenth Amendments to the United States Constitution, when they do no more than what the Federal Rules of Criminal Procedure do. This Court's decision in *Kaufman v. United States*, 394 U.S. 217 (1969), makes it quite clear that the constitutional rights of federal prisoners are as comprehensive as are those of state prisoners. What the Court of Appeals has in effect declared, is that the rules duly enacted by this Court violate the Fourth and Fourteenth Amendments of the United States Constitution. The State of Florida urges that that is most certainly a substantial federal question meriting resolution by this Court.

The lower courts both recognized the nonnecessity of a preliminary examination where an indictment is returned, thereby expressing an evaluation that there is a substantial difference between charges brought under that method and a charge brought pursuant to an information filed by the state attorney. It is the same state attorney who draws a direct information, that presents the evidence to the grand jury, advises them as to the various laws that might be involved, and in most cases makes the recommendation as

to whether they should or should not indict. Of course, no one would suggest that a non-unanimous group of lay persons comes even remotely close to a "judicial magistrate". If one cares to look at the two systems closely enough and in a realistic light, he will immediately perceive that there may be a distinction between the two in law, but there is virtually no difference in fact. We are told that, notwithstanding the superficial distinctions, somehow the Constitution is offended by denying an individual a preliminary hearing when he is charged by one method but not the other. *Amicus* submits that is an absurdity and that if we are truly concerned with having a judicial magistrate determine probable cause for a person being held in custody that it should apply no matter how the accused is charged. Moreover, it should matter not whether the charge be classified as capital, non-capital, misdemeanor or petty offense. That is truly the spirit and teaching of *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Indeed, this is exactly what the cross-petitioner is contending. While such a system would be desirable in a perfect world, unconcerned with the realities of a workable social order, this Court's rules obviously contemplate a more realistic criminal justice system.

The Court of Appeals misapprehended *Coolidge v. New Hampshire*, 403 U.S. 443, (1970) for that case dealt with the

issuance of a warrant to justify a seizure of property and this Court held such a warrant had to be issued by a neutral magistrate. *Coolidge* did not hold that subsequent to the siezure there had to be a preliminary examination to determine whether there was a basis to continue to hold the evidence. If the case *sub judice* was truly analogous to *Coolidge*, then the plaintiffs below would have been asserting that they could not be arrested except upon the issuance of a warrant by a judicial officer. Of course, they are not contending that because that is what this Court put to rest in *Ocampo v. U.S.*, 234 U.S. 91 (1914). The Court's reliance upon *Morrissey v. Brewer*, 408 U.S. 471 (1971) was equally misplaced for while this Court held a parolee was entitled to a prompt hearing to determine probable cause before someone not directly involved, this Court also made it patently clear that he need not be a judicial officer, just someone not directly involved with the parolee. That is precisely what the state attorney is! If one looks at *Morrissey* closely enough, it really supports the philosophy and rationale of Rule 3.131(a), Florida Rules of Criminal Procedure rather than undermining it.

Florida's amended Rules of Criminal Procedure, in its 24-hour first appearance Rule, its liberal bail procedures, and its mandatory speedy trial requirement, are all designed to promptly dis-

pose of criminal cases lodged against those accused of crimes. The Florida Supreme Court, like this Court, has seen fit to dispense with preliminary hearings when the accused is charged by an indictment or an information. The Circuit Court of Appeals, by declaring Rule 3.131(a) unconstitutional, has placed a cloud over the Federal Rules of Criminal Procedure. In doing so it has rendered an opinion which clearly raises substantial federal questions which should be decided by this Court.

* * *

Whether the decision of the Fifth Circuit Court of Appeals can invest a lesser tribunal (magistrate-county judge) with jurisdiction sufficient to disturb the custody of a defendant held in jail as a result of having been charged by information with a crime in Florida is what this Court must decide.

The Supreme Court of Florida is the final and unreviewable interpreter of Florida law and, with respect to matters of state law, the decisions of that court binds everyone. *Scripto, Inc. v. Carson*, 362 U.S. 207, 4 L.ed.2d 660, 80 S.Ct. 619; *Murdock v. Memphis*, 20 Wall. 590 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. As recently as 1964, this very Court in pursuance of Rule 4.61, Florida Appellate Rules, 31 F.S.A., requested of the Florida Supreme Court a decision by that tribunal regarding the

jurisdiction of the several courts involved in that case so that it could, in turn, determine whether matters pending before it should be disposed of in one as opposed to another fashion. *Dresner v. Tallahassee*, 375 U.S. 136, 11 L.ed2d 208, 84 S.Ct. 235. After having received the opinion of the Florida Supreme Court, the matters involved as to Dresner were dismissed by this Court in the following language:

> "PER CURIAM.
> The questions which this Court certified to the Supreme Court of Florida, 375 U.S. 136, 11 L.ed.2d 208, 84 S.Ct. 235, having been answered in the affirmative, 164 So.2d 208, the writ of certiorari is dismissed as improvidently granted. 28 USC § 1257." 378 U.S. 539, 12 L.ed.2d 1018, 84 S.Ct. 1895.

Again, this Court in *Callendar v. Florida*, 380 U.S. 519, 85 S.Ct. 1325, 14 L.ed.2d 265 (1965), and *Callendar v. Florida*, 383 U.S. 270, 15 L.ed.2d 749, 86 S.Ct. 924 (1966), recognized that it was bound by the Florida Supreme Court's determination regarding the jurisdiction of courts in Florida.

It follows that this Court has repeatedly recognized the exclusive authority

of the Florida Supreme Court to determine the jurisdiction of the several courts of the State of Florida. See *Dresner v. Tallahassee*, supra, and *Callendar v. State*, supra.

By operation of law (Article V, Section 2, Constitution of the State of Florida, see addendum at page 1307 through 1312 of Volume 3, Florida Statutes, 1971) the Florida Supreme Court is vested with the exclusive authority to promulgate rules and regulations regarding both jurisdiction and practice in the several courts of the state. It has adopted what is known as Florida Rules of Criminal Procedure, effective February 1, 1973, wherein the procedure to be followed with regard to arrestees is set out therein and in particular in Rules 3.120, 3.130 and 3.131.

That same Article V, Section 5, sets forth the jurisdiction of the circuit courts of the State of Florida, and Section 6 thereof sets forth the jurisdiction of the county courts. It may be easily noted that the circuit courts have jurisdiction of all matters not vested in the county courts.

When an individual is indicted or informed against in the State of Florida, those formal charges are routinely filed

with the clerk of the circuit court where the charge is brought, thereby vesting the circuit court with jurisdiction of the accused and the subject matter until such time as the issues have been disposed of. Obviously the circuit court has jurisdiction to dispose of all matters relating to that formal charge and in so doing is reviewable on appeal as a matter of right to the appropriate district court of appeal or to the Florida Supreme Court as the case may be.

The criminal jurisdiction of the county court is limited to misdemeanors. Accordingly, they are in the judicial structure of the State of Florida a lesser tribunal--in short they are Florida's magistrates much as the former United States Commissioners are now federal magistrates. In that posture their jurisdiction no more permits them to invade the province of the circuit court regarding the custody of an accused against whom an information has been filed than would a federal magistrate invate the province of a Federal District Court once an accused has been informed against. Only the circuit court or a district court of appeal or the Florida Supreme Court, or conceivably this Court, has authority to alter the custody of an individual so confined.

By ruling as it did in the decision below, the Court of Appeals purported to vest the several magistrates (county

judges) in Florida with jurisdiction to review an accused's custody ostensibly on the theory of a preliminary hearing. The net effect of this is to permit (by dint of an impossible judicial fiat) Florida's lowest court to override the authority of a Florida circuit court, even to the point of ordering the release of an accused theretofore controlled only by the circuit court or by the other courts above it mentioned previously. The Florida Supreme Court has never vested magistrates with that kind of authority--they do not have it--and they cannot be given it, however desirable that conclusion may appear to the Court of Appeal below.

CONCLUSION

For these reasons, *Amicus* respectfully urges this Court to grant certiorari and reverse the holding of the Court of Appeals in and for the Fifth Circuit.

Respectfully submitted:

ROBERT L. SHEVIN
ATTORNEY GENERAL

By _____
Raymond L. Marky
Assistant Attorney
General

And:

By _____
George R. Georgieff
Assistant Attorney
General

The Capitol Building
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Counsel for Amicus Curiae

* * *

CERTIFICATE OF SERVICE

I, GEORGE R. GEORGIEFF, Counsel for *Amicus Curiae*, and a member of the Bar of the United States, hereby certify that on the _____ day of October, 1973, I served copies of the Brief of *Amicus Curiae* on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents; and Peter L. Nimkoff, Esquire, Suite 607 Ainsley Building, 14 N.E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by a duly addressed envelope with postage prepaid.

George R. Georgieff
Assistant Attorney
General

Supreme Court, U.S.
FILED
JAN 5 1974
CLERK

In the

Supreme Court

of the

United States

OCTOBER TERM, 1973

No. 73-477

EDWARD J. GERSTEIN, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

and

THOMAS TURNER and GARY PAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

Appeals on Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit

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ADDENDUM TO DOCKET ENTRIES

The following though not appearing in the docket entries in this case do constitute part of the official file of the United States Court of Appeals for the Fifth Circuit:

June 1, 1973—Letter from Fifth Circuit Court of Appeals To All Counsel of Record

June 8, 1973—Joint Memorandum In Response To Court's Letter of June 1, 1973.

September 18, 1973—Order of Fifth Circuit Court of Appeals granting motion for stay of mandate.

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22	ORDER: Motion to proceed in forma pauperis by Nathaniel Henderson is GRANTED. (3/22/71-JLK)	24- 25
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25	Summons ret'd exec. 3/23/71 as to Morton S. Perry, Judge, S.C. Court.	32- 33
25	Summons ret'd exec. 3/22/71 as to Bernard Garmire.	34- 35
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8	Deposition of JAMES REAGAN, JR. (See next entry for exhibit)	328-352
9	Letter from Legal Services Program to the Clerk enclosing "Caseload Report for the year ended 12/31/71", to be filed as an exhibit to the deposition of A. J. Regan, Jr. (Docket Entry No. 73).	353-354
9	Pltfs' Supplemental Memo.	355-366
10	Memo of Amicus Curiae, Dade County Bar Association.	367-378
14	Notice of taking deposition of Judge Ruth Sutton.	379-381
22	Notice of taking depositions of Morton L. Perry, Judge, and Sidney L. Segall, Judge.	382-384

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
22	Deposition of Deft. Ruth L. Sutton taken by Pltfs. 6/5/71.	385-448
15	Deposition of Sidney L. Segall.	423-448
July		
6	Motion for Separated Trials and Transfer of Parties and Memo by counsel.	449-450
6	Notice of Additional Authority filed by pltfs.	452-453
15	Deposition of Morton L. Perry.	454-468
16	Motion for Separate Trials and Transfer of Parties and Memo, by Deft. Charles Snowden.	469-470
Aug.		
11	Motion for Partial Summary Judgment, filed by Pltfs.	471-472
11	Memo in support of Motion for Partial Summary Judgment.	473-483
16	Reply Memorandum, filed by defendants.	484-487
Sept.		
12	OPINION & FINAL JUDGMENT: 1. This is a valid class action. 2. Named pltfs. shall be given a preliminary hearing to determine probable cause for their arrest by a committing magistrate unless their cases have been otherwise concluded. 3. Defts., with 60 days of date hereof,	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	shall submit to the Court a plan providing for preliminary hearings in all cases wherein prosecution is to be upon direct information. The preliminary hearing shall be within a reasonable time of the arrest. 4. Subsequent to final hearing certain motions for summary judgment, severance & transfer of party defts. to party pltf. were filed. These motions are hereby denied. 5. Court retains jurisdiction for a consideration of the plan & enforcement of the provisions of this final judgment. (10/12/71-JLK) R106	488-502
Nov.		
10	(Richard E. Gerstein, State Atty. for the Eleventh Judicial Circuit, Dade County, Florida, Deft.) Petition for rehearing and/or clarification and supporting memo of law.	503-510
12	Notice of Appeal filed by Pltfs. (The portion appealed includes only two paragraphs on page fourteen of the Opinion and Final Judgment) Copies mld. Judge Ruth L. Sutton; Duke Winsor and James Jorgensen; Barry Richard, Esq.; Judge Sidney Segall; Judge Ralph B. Ferguson, Jr.; Judge Sylvester P. Adair; Alan Diamond, Esq.; Judge Charles Snowden; Judge Jason Berkman; Rocky Pomerance	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	Chief of Police; Judge James Rainwater; Alan H. Rothstein, City Atty.; Bernard E. Garmire; Alden Berry and Judge Morton S. Perry, and U.S. Court of Appeals; Rogow.	511-512
14	Response To Petition For Re-Hearing or Clarification, by Pltfs.	513-518
Dec.		
13	Defendant E. Wilson Purdy's Plan providing for Preliminary Hearings.	519-529
14	Adoption of E. Wilson Purdy's Plan providing for Preliminary hearings. (Deft.).	530-531
16	ORDER: that a hearing to consider plan submitted by Deft., E. Wilson Purdy, set for Tues. 12-21-71, at 10:00 AM, before Judge King. (12-15-71-JLK).	532
21	Pltf's Response to Plan of E. Wilson Purdy.	533-537
21	Response to Deft. E. Wilson Purdy's Plan providing for Preliminary hearings. (Deft. James Rainwater.)	538-540
22	ORDER: This cause came on for consideration upon the Court's own motion, sua sponte, to extend the time for the transmittal by the clerk of the court of the record in this cause for purposes of appeal. In as much as this court has need for the use of said record for purposes of examining the proposed committing magistrate system as submitted to the	

DOCKET ENTRIES (cont.)

Date	Proceedings	Pages
	court by the Defts. in this cause, it is therefore, ORDERED that the time for transmitting the record on appeal is extended to February 1, 1972. (12-/22/71-JLK) Certified copy mailed to U.S. Court of Appeals.	541
1972 Jan.		
25	Order Adopting Plan to Provide Preliminary Hearings. (See Order for details. (1/25/72-JLK)	542-549
	CLERK'S CERTIFICATE.	550

Certified to be a true and correct copy of the original.

U.S. District Court
Joseph I. Bogart, Clerk
Southern Dist. of Fla.

By /s/ Ruth M. Hood
Deputy Clerk

Date: 1-20-72

[1]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO. 71-448-Civ-JLK

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf
of all others similarly situated,

Plaintiffs,

vs.

JAMES RAINWATER, MORTON S. PERRY, SIDNEY SEGALL, Judges of the Small Claims Court in and for Dade County, Florida; RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida; RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON, and SYLVESTER ADAIR, Justices of the Peace in and for Dade County, Florida; E. WILSON PURDY, Sheriff of Dade County, Florida; BERNARD E. GARMIRE, Chief of Police of the City of Miami, Florida; DAVID MAYNARD, Chief of Police of the City of Hialeah, Florida; ROCKY POMERANCE, Chief of Police of the City of Miami Beach, Florida,

Defendants.

COMPLAINT

[Filed March 22, 1971]

JURISDICTION

(1) This is an action brought by the plaintiffs on behalf of themselves and all others similarly situated for declaratory judgment and for preliminary and permanent injunction as authorized by Title 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1343(3) and (4).

(2) The plaintiffs and all others similarly situated seek to secure the rights, privileges and immunities established by the Fourth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of [2] the Constitution of the United States. The plaintiffs and all others similarly situated have been deprived of such rights, privileges and immunities by: (1) the various defendants' refusal to provide preliminary hearings to judicially determine probable cause for incarcerating plaintiffs; and (2) the arbitrary and irrational procedures of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees which creates two classifications of defendants—i.e., those who receive a preliminary hearing in Justice of Peace Courts and those who are denied such a hearing altogether; and (3) the defendant judges' imposition of monetary bail upon indigents as a condition of release from custody pending trial.

PARTIES

(3) Plaintiff, ROBERT PUGH, is a male citizen of the United States and of the State of Florida. He is presently incarcerated in the Dade County Jail charged with robbery, carrying a concealed weapon and possession of a firearm during the commission of a felony, and is awaiting trial in the Criminal Court of Record in and for Dade County, Florida. No bond has been set in his case pursuant to F.S.A. Const. Art., 1, §14 since the main pending charge is robbery.

(4) Plaintiff, NATHANIEL HENDERSON, is a male citizen of the United States and of the State of Florida. He is presently incarcerated in the Dade County Jail charged with breaking and entering, possession of narcotics, resisting arrest with violence and assault on a police officer, and is awaiting trial in the Criminal Court of Record in and for Dade County, Florida. Plaintiff remains incarcerated solely because he is financially unable to post the Four thousand Five hundred Dollar ($4,500.) bond set in his case.

[3] (5) The plaintiffs are members of a class composed of all persons arrested by law enforcement officers in Dade County, Florida, who are being detained in the Dade County Jail solely upon a direct information filed by the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and who as a result have not been provided with: (1) an opportunity to be heard; (2) an opportunity to confront the witnesses against them; (3) an opportunity to have probable cause (if any exists) established by a judicial officer of the State of Florida. The persons in the class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

(6) Plaintiff HENDERSON also represents a class of persons who are incarcerated in the Dade County Jail solely because of their financial inability to post monetary bail as a condition of release pending trial. The persons in this class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative party is typical of the claims of the class; and the representative party will fairly and adequately protect the interests of the class.

(7) Defendant RICHARD E. GERSTEIN, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida. In such capacity he is charged with the authority and responsibility pursuant to Florida Statutes, Chapters 27 and 906 for filing informations against persons alleged to have committed criminal acts.

[4] (8) Defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON and SYLVESTER ADAIR are Justices of the Peace in and for Dade County, Florida and in such capacity have the authority and responsibility pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(9) Defendants JAMES RAINWATER, MORTON S. PERRY, and SIDNEY SEGALL are Judges of the Small Claims Court in and for Dade County, Florida, and in such capacity are empowered pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(10) Defendant E. WILSON PURDY is the Director of the Public Safety Department, Dade County, Florida. In such capacity defendant PURDY, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(11) Defendant BERNARD E. GARMIRE is the Chief of Police of the City of Miami Police Department and in such capacity defendant GARMIRE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(12) Defendant DAVID MAYNARD is the Chief of Police of the City of Hialeah, Florida and in such capacity defendant MAYNARD, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(13) Defendant ROCKY POMERANCE is the Chief of Police of the City of Miami Beach, Florida and in such capacity defendant [5] POMERANCE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(14) At all times hereinafter mentioned, the acts complained of were carried out by the above named defendants, their agents, servants and employees in their official capacities under color of state law, regulation, custom and usage.

FACTS

(15) Plaintiff ROBERT PUGH, was arrested on March 3, 1971 and charge with robbery, carrying a concealed weapon and possession of a firearm during the commission of a felony. On March 4, 1971 he was presented to defendant SNOWDEN, who was sitting solely for the purpose of setting bond. Because plaintiff PUGH was charged with robbery, no bond was set pursuant to F.S.A. Const. Art., 1, § 14. At the bond hearing on March 4, 1971, no evidence was presented against the plaintiff to judicially determine probable cause for detaining the plaintiff.

(16) Thereafter an information charging plaintiff PUGH with robbery and other offenses was filed by defendant GERSTEIN with the Clerk of the Criminal Court of Record in and for Dade County, Florida. A copy of said information is attached hereto as Plaintiffs' Exhibit "A". Plaintiff was not present, nor given an opportunity to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the attached information was issued.

(17) Plaintiff NATHANIEL HENDERSON was arrested on March 2, 1971, and charged with breaking and entering, possession of narcotics, resisting arrest with violence and assault on a police officer. On March 3, 1971, he was presented to defendant [6] BERKMAN, who was sitting solely for the purpose of setting bond. Bond was set in the amount of $4,500. At the bond hearing on March 3, 1971, no evidence was presented against the plaintiff to judicially determine probable cause for detaining the plaintiff.

(18) Thereafter an information charging plaintiff HENDERSON with breaking and entering and other offenses was filed by defendant GERSTEIN with the Clerk of the Criminal Court of Record in and for Dade County, Florida. A copy of said information is attached hereto as Plaintiffs' Exhibit "B". Plaintiff was not present, nor given an opportunity to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the attached information was issued.

THE POLICIES AND PRACTICES COMPLAINED OF

COUNT I.

(19) It is the policy, pattern and practice of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their agents, servants and employees to fail to present arrested persons before judges without unnecessary delay for the purpose of establishing probable cause at a preliminary hearing for the arrest of said defendant.

(20) It is the policy and practice of defendant GERSTEIN and his agents, servants and employees to file direct informations based upon testimony provided to an assistant state attorney by a police officer. Furthermore, it is the policy and practice of defendant GERSTEIN, his agents, servants and employees to refuse to provide a defendant in custody by virtue of a directly filed information an opportunity for a binding preliminary hearing to determine probable cause for his incarceration.

[7] (21) It is the policy and practice of defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON, SYLVESTER

ADAIR, JAMES RAINWATER, MORTON S. PERRY, and SIDNEY SEGALL to refuse to provide a preliminary hearing to persons incarcerated in the Dade County Jail by virtue of a direct information filed by defendant GERSTEIN.

(22) The above described actions of the named defendants results in the incarceration of plaintiffs and members of their class solely upon a direct information filed by the state attorney and deprives said plaintiffs of their liberty without an opportunity to be heard, to confront the witnesses against them, or to have a judicial determination of probable cause made, all of which is in violation of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

COUNT II.

(23) Plaintiffs repeat and reallege the facts set forth in paragraphs 1 through 22 above.

(24) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees file charges upon persons they arrest with either a justice of the peace, in Dade County, Florida, or with the defendant, State Attorney GERSTEIN.

(25) If said charges are filed with the defendant State Attorney, then as set forth in Count I, the plaintiff is deprived of his right to a hearing based upon the direct information filed by the defendant GERSTEIN.

(26) If however, defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees choose to file the charges with a justice of the peace, then a pre- [8] liminary hearing will be accorded to the arrested person in due course.

(27) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees have unfettered discretion in choosing the authorities with whom they will file charges. No standards or rules guide said decisions.

(28) The actions of defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees thereby creates two classes of arrested persons: (1) persons who are denied preliminary hearings because the arresting officer has filed charges directly with the State Attorney's Office, thereby causing an information to issue, and (2) persons who are granted preliminary hearings because the arresting officer has filed charges with one of the Justices of Peace of Dade County, Florida.

(29) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. The plaintiffs and members of their class, who are being denied preliminary hearings, are thus denied equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States as a result of the irrational, unreasonable, arbitrary and capricious actions of the agents of defendants PURDY, GARMIRE, MAYNARD and POMERANCE.

COUNT III.

(30) Plaintiff HENDERSON repeats and realleges paragraphs 1, 2, 4, 6, 8, 9, 14 and 17 set forth above.

(31) It is the policy, pattern and practice of defendant judges RAINWATER, PERRY, SEGALL, SNOWDEN, SUTTON, FERGUSON, ADAIR and BERKMAN to set monetary bail upon persons presented before them as a condition of release pending trial.

[9] (32 Plaintiff HENDERSON has remained incarcerated since March 3, 1971, solely because of his financial inability to post the Four thousand Five hundred Dollar ($4500.) bail set to assure his future appearance.

(33) The actions of the defendant judges creates two classes of arrested persons: (1) persons who are financially able to post the monetary bail bonds set in their respective cases and thus secure their release from jail, and (2) persons who are financially unable to post the monetary bail bonds set in their respective cases and who must remain in jail solely because of their poverty.

(34) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. It discriminates against poor persons solely because of their poverty without any rational basis. Plaintiff HENDERSON and members of his class are thus denied equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

NATURE OF RELIEF

(35) There is between the parties and actual controversy as herein set forth. The plaintiffs and the classes they represent, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. The plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights and injunction. Any other remedies to which plaintiffs and members of their class can be remitted would be attended by such uncertainties and delays as to deny them substantial relief, would involve a multiplicity [10] of suits and cause further irreparable injury, damage and inconvenience of the plaintiffs. Unless the acts complained of are declared unconstitutional and enjoined by this Court, thousands of persons will be similarly incarcerated without an opportunity to be heard and solely because of their poverty in violation of the Due Process and Equal Protection Clauses of the Constitution of the United States in the same manner as plaintiffs herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court assume jurisdiction of this cause and:

(1) Enter a declaratory judgment pursuant to Title 28 U.S.C. § § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERK-

MAN of refusing to provide a hearing to determine probable cause for plaintiffs and their class immediately after arrest violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Enjoin defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, REGUSON, SUTTON, ADAIR and BERKMAN from failing to accord plaintiffs and members of their class due process hearings immediately after arrest to determine whether or not probable cause exists for the detention of the plaintiffs and their class.

(3) Enter declaratory judgment pursuant to Title 28 U.S.C. § § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and [11] employees of arbitrarily filing charges against plaintiffs and members of their class with the State Attorney for the Eleventh Judicial Circuit in and for Dade County Florida or the Justices of the Peace of Dade County, Florida, creates an arbitrary and irrational classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(4) Enjoin defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees from arbitrarily filing charges upon plaintiffs and members of their class with the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida or the Justices of the Peace of Dade County, Florida.

(5) Enter declaratory judgment pursuant to Title 28 U.S.C. § § 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of defendants, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN of setting monetary bail upon plaintiffs and members of their class as a sole condition for their release pending trial results in an arbitrary and irrational discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

(6) Enjoin defendants RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN from using monetary bail as the sole means of granting pre-trial release for plaintiffs and members of their class.

[12] (7) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

/s/ Bruce S. Rogow

BRUCE S. ROGOW, ESQUIRE
RENE V. MURAL, ESQUIRE
Legal Services of Greater Miami, Inc.
622 N. W.62 Street
Miami, Florida 33150
Tel: 759-1608

/s/ Phillip A. Hubbart

PHILLIP A. HUBBART
ESQUIRE
Public Defender of the Eleventh
Judicial Circuit of Dade County,
Florida
Metropolitan Justice Building
1351 N. W.12 Street
Miami, Florida 33125
Tel: 377-7156

COUNSEL FOR PLAINTIFFS

[13]

VERIFICATION

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

THE UNDERSIGNED having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Robert W. Pugh

SWORN TO AND SUBSCRIBED before me, this 11 day of March, 1971.

/s/ E. L. Tribble

NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

My Commission expires:

Notary Public, State of Florida at Large. My commission expires Jan. 28, 1975. Bonded through Fred W. Diestelhorst.

[14]

VERIFICATION

STATE OF FLORIDA)
SS:
COUNTY OF DADE)

THE UNDERSIGNED having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Nathaniel Henderson

SWORN TO AND SUBSCRIBED before me, this 11 day of March, 1971.

/s/ E. L. Tribble

NOTARY PUBLIC,
STATE OF FLORIDA AT LARGE

My Commission expires:

Notary Public, State of Florida at Large. My commission expires Jan. 28, 1975. Bonded through Fred W. Diestelhorst.

[54]

[TITLE OMITTED]

[Filed April 6, 1971]

ANSWER OF DEFENDANT RICHARD E. GERSTEIN

COMES NOW Richard E. Gerstein, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and as his Answer to the Complaint states as follows:

. The defendant admits the allegations of paragraph one (1) of the Complaint.

2. The defendant denies the allegations of paragraph two (2) of the Complaint.

3. The defendant admits the allegations of paragraph (3) of the Complaint.

4. The defendant admits the allegations of paragraph four (4) of the Complaint with the exception of the last sentence thereof. The defendant is without [55] knowledge of the financial ability of the plaintiff Nathaniel Henderson and, therefore, cannot admit or deny the last sentence of paragraph four (4) of the Complaint.

5. The defendant admits the allegations of paragraph five (5) of the Complaint.

6. The defendant is without knowledge of the allegations of paragraph six (6) of the Complaint and, therefore, cannot admit or deny.

7. The defendant admits the allegations of paragraph seven (7) of the Complaint.

8. The defendant admits the allegations of paragraph eight (8) of the Complaint.

9. The defendant admits the allegations of paragraph nine (9) of the Complaint.

10. The defendant admits the allegations of paragraph ten (10) of the Complaint.

11. The defendant admits the allegations of paragraph eleven (11) of the Complaint.

12. The defendant admits the allegations of paragraph twelve (12) of the Complaint.

13. The defendant admits the allegations of paragraph thirteen (13) of the Complaint.

14. The defendant admits the allegations of paragraph fourteen (14) of the Complaint.

15. The defendant admits the allegations of paragraph fifteen (15) of the Complaint.

16. The defendant admits the allegations of paragraph sixteen (16) of the Complaint.

17. The defendant admits the allegations of paragraph seventeen (17) of the Complaint.

18. The defendant admits the allegations of paragraph eighteen (18) of the Complaint.

19. The defendant is without sufficient knowledge of the allegations contained in paragraph nineteen (19) so as to admit or deny the Complaint.

[56] 20. The defendant admits the allegations of paragraph twenty (20) of the Complaint.

21. The defendant is without sufficient knowledge of the allegations contained in paragraph twenty-one (21) so as to admit or deny the Complaint.

22. The defendant denies the allegations of paragraph twenty-two (22) of the Complaint.

23. The defendant repeats and realledges the Answers set forth in paragraphs one (1) throught twenty-two (22) above.

24. The defendant admits the allegations of paragraph twenty-four (24) of the Complaint.

25. In Answer to paragraph twenty-five (25) of the Complaint, the defendant admits that there is no hearing when charges are filed with the State Attorney, but denies that this constitutes any deprivation of any right of the plaintiffs or any class they may represent.

26. The defendant admits the allegations of paragraph twenty-six (26) of the Complaint.

27. The defendant denies the allegations of paragraph twenty-seven (27) of the Complaint.

28. The defendant denies the allegations of paragraph twenty-eight (28) of the Complaint.

29. The defendant denies the allegations of paragraph twenty-nine (29) of the Complaint.

30. In Answer to paragraph thirty (30) of the Complaint, the defendant repeats and realledges his Answer to paragraphs one (1), two (2), four (4), six (6), eight (8), nine (9), fourteen (14), and seventeen (17) set forth above.

31. The defendant is without sufficient knowledge of the allegations contained in paragraph thirty-one (31) so as to admit or deny the Complaint.

32. The defendant is without sufficient knowledge of the allegations contained in paragraph thirty-two (32) so as to admit or deny the Complaint.

[57] 33. The defendant denies the allegations of paragraph thirty-three (33) of the Complaint.

34. The defendant denies the allegations of paragraph thirty-four (34) of the Complaint.

WHEREFORE, the defendant Richard E. Gerstein, having answered the Complaint, prays that the Court enter a final judgment in his favor.

RICHARD E. GERSTEIN
STATE ATTORNEY

By: /s/ Jack R. Blumenfeld

JACK R. BLUMENFELD
Assistant State Attorney

[58]

[TITLE OMITTED]

MEMORANDUM OF LAW
AND MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant Richard E. Gerstein as State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, by and through the undersigned Assistant State Attorney and moves this Court for a summary final judgment in his favor and states that there are no material disputed issues of fact and that the Defendant-Gerstein is entitled to a judgment in his favor for the reason stated in the attached Memorandum of Law.

/s.. Jack R. Blumenfeld

JACK R. BLUMENFELD, Esq.
Attorney for Defendant-Gerstein
Assistant State Attorney
Metropolitan Justice Building
1351 Northwest 12 Street
Miami, Florida 33125

[59]

[TITLE OMITTED]

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-GERSTEIN'S MOTION FOR SUMMARY JUDGMENT

The undisputed facts in this case are as follows:

1. The Plaintiffs have both been charged with violations of the Florida Statutes.

2. They have been charged by Information (which Informations are attached to the Complaint as Exhibits A and B), as permitted by Article I, Section 15 (a) of the Florida Constitution.

3. That prior to the filing of the Information there was no Preliminary Hearing.

4. That the Informations were filed by the Defendant-Gerstein, or by one of his duly appointed Assistant State Attorneys, under and by his authority.

5. It is the policy and practice of the Defendant-Gerstein, his agents, servants and employees to [60] file Information based on independent examination of the facts, notwithstanding the result of any Preliminary Hearing, if any, and notwithstanding that there has been no Preliminary Hearing.

6. It is the policy and practice of the Defendant-Gerstein, his agents, servants, and employees to resist any attempt to have Preliminary Hearing after an Information has been filed or an indictment has been found.

* * *

[82]

[TITLE OMITTED]

COMPLAINT

JURISDICTION

(1) This is an action brought by the intervening plaintiffs on behalf of themselves and all others similarly situated for declaratory judgment and for preliminary and permanent injunction as authorized by Title 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1343(3) and (4).

[83] (2) The intervening plaintiffs and all others similarly situated seek to secure the rights, privileges and immunities established by the Fourth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States. The intervening plaintiffs and all others similarly situated have been deprived of such rights, privileges and immunities by: (1) the various defendants' refusal to provide preliminary hearings to judicially determine probable cause for incarcerating intervening plaintiffs; and (2) the arbitrary and irrational procedures of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees which creates two classifications of defendants —i.e., those who receive a preliminary hearing in Justice of the Peace Courts and those who are denied such a hearing altogether; and (3) the defendant judges' imposition of monetary bail upon indigents as a condition of release from custody pending trial.

PARTIES

(3) Intervening plaintiff THOMAS W. TURNER, is a male citizen of the United States and of the State of Florida. He is presently incarcerated in the Dade County Stockade charged with auto theft, and is awaiing trial in the Criminal Court of Record in and for Dade County, Florida. He remains incarcerated solely becausehe is unable to post the $1,000 bond set in his case.

(4) Intervening plaintiff GARY FAULK, is a male citizen of the United States and of the State of California. He is presently incarcerated in the Dade CountyStockade charged with possession of marijuana and soliciting a ride (hitchhiking) and is awaiting trial in the Crimial Court of Record in and for Dade County, Florida and te Metropolitan Court in and for Dade [84] County, Flrida. He remains incarcerated solely because he is financialy unable to post the $1,525 bond set in his case.

(5) The intervening plaintiffs are members of a class composed of all persons arrested by law enforcement officers in Dade County, Florida, who are beingdetained in the Dade County Jail or Stockade solely upon a direct information filed by the State Attorney for theEleventh Judicial Circuit in and for Dade County, Floida, and who as a result have not been provided with: () an opportunity to be heard; (2) an opportunity to confront the witnesses against them; (3) an opportunity to hve probable cause (if any exists) established by a judicil officer of the State of Florida. The persons in the clas are so numerous that joinder of all persons is impractial; there are questions of law and fact common to the lass; the claims of the representative parties will fairly and adequately protect the interests of the class.

(6) The intervening plaintiffs also represent a class of persons who are incarcerated in the Dade County Stockade or Jail solely because of their financial inability to post monetary bail as a condition of release pending trial. The persons in this class are so numerous that joinder of all persons is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class.

(7) Defendant RICHARD E. GERSTEIN, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida. In such capacity he is charged with the authority and responsibility pursuant to Florida Statutes, Chapters 27 and 906 [85] for filing informations against persons alleged to have committed criminal acts.

(8) Defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON and SYLVESTER ADAIR are Justices of the Peace in and for Dade County, Florida and in such capacity have the authority and responsibility pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(9) Defendants JAMES RAINWATER, MORTON S. PERRY, and SIDNEY SEGALL are Judges of the Small Claims Court in and for Dade County, Florida, and in such capacity are empowered pursuant to F.S.A. §901.01 and Rule 1.122 of the Florida Rules of Criminal Procedure to provide preliminary hearings for defendants accused of crimes in Dade County, Florida.

(10) Defendant E. WILSON PURDY is the Director of the Public Safety Department, Dade County, Florida. In such capacity defendant PURDY, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(11) Defendant BERNARD E. GARMIRE is the Chief of Police of the City of Miami Police Department and in such capacity defendant GARMIRE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(12) Defendant DAVID MAYNARD is the Chief of Police of the City of Hialeah, Florida and in such capacity defendant MAYNARD, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

[86] (13) Defendant ROCKY POMERANCE is the Chief of Police of the City of Miami Beach, Florida and in such capacity defendant POMERANCE, his agents, servants and employees enforce the statutes of the State of Florida and are responsible for arresting persons who allegedly have committed violations of said statutes.

(14) At all times hereinafter mentioned, the acts complained of were carried out by the above named defendants, their agents, servants and employees in their official capacities under color of state law, regulation, custom and useage.

FACTS

(15) Intervening plaintiff THOMAS W. TURNER, was arrested on March 11, 1971 and charged with auto theft. On March 12, 1971 he was presented to defendant SNOWDEN, who was sitting solely for the purpose of setting bond. Bond was set in the amount of $1,000. At the bond hearing on March 12, 1971, no evidence was presented against the plaintiff to judicially determine probable cause for detaining the plaintiff.

(16) An information charging the intervening plaintiff TURNER with auto theft has been or will be filed by Defendant GERSTEIN with the Clerk of the Criminal Court of Record in and for Dade County, Florida. Intervening plaintiff will not be given an opportunity to be present, nor to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the information will be issued.

(17) Intervening plaintiff GARY FAULK was arrested on March 19, 1971 and charged with soliciting a ride (hitchhiking) and possession of marijuana. On March 20, 1971 he was presented to defendant RAINWATER who was sitting solely for the purpose of setting bond. Bond was set in the amount of $1,500 on the possession charge and $25 on the hitchhiking charge. At the bond hearing [87] on March 20, 1971 no evidence was presented against the intervening plaintiff to judicially determine probable cause for detaining him.

(18) An information charging intervening plaintiff FAULK with possession of marijuana has been or will be filed by defendant GERSTEIN with the Clerk of the Crim-

inal Court of Record in and for Dade County, Florida. Intervening plaintiff will not be given an opportunity to be present, nor an opportunity to be heard, nor to cross examine, nor to confront the witnesses against him upon whose testimony the information will be issued.

THE POLICIES AND PRACTICES COMPLAINED OF

COUNT I.

(19) It is the policy, pattern and practice of defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their agents, servants and employees to fail to present arrested persons before judges without unnecessary delay for the purpose of establishing probable cause at a preliminary hearing for the arrest of said defendant.

(20) It is the policy and practice of defendant GERSTEIN and his agents, servants and employees to file direct informations based upon testimony provided to an assistant state attorney for a police officer. Furthermore, it is the policy and practice of defendant GERSTEIN, his agents, servants and employees to refuse to provide a defendant in custody by virtue of a directly filed information an opportunity for a binding preliminary hearing to determine probable cause for his incarceration.

(21) It is the policy and practice of defendants RUTH SUTTON, CHARLES SNOWDEN, JASON BERKMAN, RALPH FERGUSON, SYLVESTER ADAIR, JAMES RAINWATER, MORTON S. PERRY, and SIDNEY [88] SEGALL to refuse to provide a preliminary

hearing to persons incarcerated in the Dade County Jail by virtue of a direct information filed by defendant GERSTEIN.

(22) The above described actions of the named defendants results in the incarceration of the intervening plaintiffs and members of their class solely upon a direct information filed by the state attorney and deprives said intervening plaintiffs of their liberty without an opportunity to be heard, to confront the witnesses against them, or to have a judicial determination of probable cause made, all of which is in violation of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

COUNT II.

(23) Plaintiffs repeat and reallege the facts set forth in paragraphs 1 through 22 above.

(24) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees file charges upon persons they arrest with either a justice of the peace, in Dade County, Florida, or with the defendant, State Attorney GERSTEIN.

(25) If said charges are filed with the defendant state attorney, then as set forth in Count I, the intervening plaintiffs are deprived of their right to a hearing based upon the direct informations filed by the defendant GERSTEIN.

(26) If however, defendants PURDY, GARMIRE, MAYNARD and POMERANCE, through their agents, servants and employees choose to file the charges with a justice of the peace, then a preliminary hearing will be accorded to the arrested person in due course.

(27) Defendants PURDY, GARMIRE, MAYNARD and POMERANCE, and their employees have unfettered discretion in choosing the [89] authorities with whom they will file charges. No standards or rules guide said decisions.

(28) The actions of Defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees thereby creates two classes of arrested persons: (1) persons who are denied preliminary hearings because the arresting officer has filed charges directly with the State Attorney's Office, thereby causing an information to issue, and (2) persons who are granted preliminary hearings because the arresting officer has filed charges with one of the Justices of the Peace of Dade County, Florida.

(29) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. The intervening plaintiffs and members of their class, who are being denied preliminary hearings, are thus denied equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States as a result of the irrational, unreasonable, arbitrary and capricious actions of the agents of defendants PURDY, GARMIRE, MAYNARD and POMERANCE.

COUNT III.

(30) Intervening plaintiffs repeat and reallege paragraphs 1, 2, 4, 6, 8, 9, 14 and 17 set forth above.

(31) It is the policy, pattern and practice of defendant judges RAINWATER, PERRY, SEGALL, SNOWDEN, SUTTON, FERGUSON, ADAIR and BERKMAN to set monetary bail upon persons presented before them as a condition of release pending trial.

(32) Intervening plaintiffs have remained incarcerated solely because of their financial inability to post the monetary bail set to assure their future appearances.

(33) The actions of the defendant judges creates two classes of arrested persons: (1) persons who are financially [90] able to post the monetary bail bonds set in their respective cases and thus secure their release from jail, and (2) persons who are financially unable to post the monetary bail bonds set in their respective cases and who must remain in jail solely because of their poverty.

(34) The creation of these two classes of arrested persons is arbitrary, unreasonable and capricious. It discriminates against poor persons solely because of their poverty without any rational basis. Intervening plaintiffs and members of their class are thus denied equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

NATURE OF RELIEF

(35) There is beween the parties an actual controversy as herein set forth. The intervening plaintiffs and the classes they represent, are suffering irreparable injury and are threatened with irreparable injury in the future by reason of the acts herein complained of. The intervening plaintiffs have no plain, adequate or complete remedy to redress the wrongs and unlawful acts herein complained of other than this action for declaration of rights and injunction. Any other remedies to which intervening plaintiffs and members of their class can be remitted would be attended by such uncertainties and delays as to deny them substantial relief, would involve a multiplicity of suits and cause further irreparable injury, damages and inconvenience of the intervening plaintiffs. Unless the acts complained of are declared unconstitutional and enjoined by this Court, thousands of persons will be similarly incarcerated without an opportunity to be heard [91] and solely because of their poverty in violation of the Due Process and Equal Protection Clauses of the Constitution of the United States in the same manner as intervening plaintiffs herein.

PRAYER FOR RELIEF

WHEREFORE, intervening plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court assume jurisdiction of this cause and:

(1) Enter a declaratory judgment pursuant to Title 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERK-

MAN of refusing to provide a hearing to determine probable cause for intervening plaintiffs and their class immediately after arrest violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(2) Enjoin defendants GERSTEIN, RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN from failing to accord intervening plaintiffs and members of their class due process hearings immediately after arrest to determine whether or not probable cause exists for the detention of the intervening plaintiffs and their class.

(3) Enter declaratory judgment pursuant to Title 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of the defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees of arbitrarily filing charges against intervening plaintiffs and members of their class with the State Attorney [92] for the Eleventh Judicial Circuit in and for Dade County, Florida or the Justices of the Peace of Dade County, Florida, creates an arbitrary and irrational classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(4) Enjoin defendants PURDY, GARMIRE, MAYNARD and POMERANCE and their agents, servants and employees from arbitrarily filing charges upon intervening plaintiffs and members of their class with the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida or the Justices of the Peace of Dade County, Florida.

(5) Enter declaratory judgment pursuant to Title 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practices of defendants RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN of setting monetary bail upon intervening plaintiffs and members of their class as a sole condition of their release pending trial results in an arbitrary and irrational discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

(6) Enjoin defendants RAINWATER, PERRY, SEGALL, SNOWDEN, FERGUSON, SUTTON, ADAIR and BERKMAN from using monetary bail as the sole means of granting pre-trial release for intervening plaintiffs and members of their class.

(7) Grant such other and further relief as this Court may deem must and proper.

Respectfully submitted,

/s/ Bruce S. Rogow

BRUCE S. ROGOW, ESQUIRE
RENE V. MURAI, ESQUIRE
Legal Services of Greater Miami, Inc.
622 N. W. 62 Street
Miami, Florida 33150

PHILLIP A. HUBBART, ESQUIRE
Public Defender
Metropolitan Justice Building
1351 N. W. 12 Street
Miami, Florida 33125

[93]

VERIFICATION

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

THE UNDERSIGNED, having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named Plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Thomas W. Turner

SWORN TO AND SUBSCRIBED BEFORE me, this 31 day of March, 1971.

/s/ Eanet L. Leibble

Notary Public,
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE. MY COMMISSION EXPIRES JAN. 28, 1975. Bonded through FRED W. DIESTELHORST.

[94]

VERIFICATION

STATE OF FLORIDA,)
) SS
COUNTY OF DADE,)

THE UNDERSIGNED, having personally appeared before me, a Notary Public, and after being duly sworn, deposes and says that he is the named plaintiff in the foregoing complaint and that the facts alleged therein are true to the best of his knowledge, information and belief.

/s/ Gary Faulk

SWORN TO AND SUBSCRIBED before me, this 30 day of March, 1971.

/s/ Earnest L. Liebble

Notary Public
State of Florida at Large
My Commission Expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE. MY COMMISSION EXPIRES JAN. 28, 1975. Bonded through FRED W. DIESTELHORST.

• • •

[14]

PUBLIC DEFENDER
Eleventh Judicial Circuit of Florida
Metropolitan Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

PHILLIP A. HUBBART
Public Defender

Telephone
377-7166

May 12, 1971

The Honorable James L. King, Judge
United States District Court for the
Southern District of Florida
Main Post Office Building
Miami, Florida

RE: PUGH V. RAINWATER, CASE NO. 71-448-Civ-JLK

Dear Judge King,

In response to your Honor's request that the Plaintiffs and the State Attorney, in conjunction with the other local officials in the above-styled cause, confer for the purpose of working out arrangements to provide preliminary hearings for all persons arrested for state offenses in Dade County, Florida, Mr. Jack Blumenfeld, representing the State Attorney's Office, Philip Hubbart, the Public Defender for Dade County and co-counsel for the Plaintiffs, and Mr. Bruce Rogow, co-counsel for the Plaintiffs, have conferred for the above stated purpose. Here are the results of our conversations.

1. It has not been possible for the parties t agree on procedures to immediately implement preliminar hearings for all persons charged with state offenses i Dade County, Florida. It is the State Attorney's positi that it is impossible to provide such hearings immediatel in all cases without cooperation of all elements of the cminal justice system and enabling legislation.

2. If the Court rules that preliminary hearin are constitutionally required for all persons arrested fostate offenses in Dade County, Florida, the State Attorney ould ask [15] that the State be given (90) days, from date of the Court's order or from the date of thenandate of an appellate Court should there be an peal, to implement the provisions of this order. This ninet (90) day period is requested so as to make the necessa ar-rangements with local officials to provide such prelimary hearings and might act as impetus for the Florida tate Legislature to pass pending legislation to provide acommitting magistrate system for Dade County, Florida The Plaintiffs have no objection to this request.

Respectfully submitted,

/s/ Jack A. Blumenfeld

JACK R. BLUMENFELD
Assistant State Attorney

/s/ Phillip A. Hubbart

PHILLIP A. HUBBART
Public Defender
PAH/fb

cc: Bruce Rogow, Esquire

Judge Sidney Segall

Judge Ralph B. Ferguson, Jr.

Barry Richard, Esquire

Alan H. Rothstein, Esquire

Alan Diamond, Esquire

Judge Morton S. Perry

Judge Charles Snowden

Judge Jason Berkman

• • •

[256]

[TITLE OMITTED]

ORDER

[Filed May 14, 1971]

THIS CAUSE came on to be heard before me on May 10, 1971, upon the various motions of defendants and plaintiffs. The Court had the benefit of memoranda and oral argument from counsel for the respective parties. Based upon said presentations, it is hereby

ORDERED and ADJUDGED:

1. The Motion for Summary Judgment by Defendant GERSTEIN is DENIED.

2. The Motion to Dismiss by Defendant PURDY is DENIED. Defendant PURDY shall have 20 days from the entry of this Order in which to file an Answer.

3. The Motions for Judgment on the Pleadings by Defendant GARMIRE and POMERANCE are DENIED.

4. The Motion to Intervene as Plaintiffs by THOMAS W. TURNER and GARY FAULK is GRANTED. The Motion of the Intervening Plaintiffs to proceed *in forma pauperis* is also GRANTED.

5. The Plaintiffs' Motion for Partial Summary Judgment against Defendant GERSTEIN is taken under advisement

6. The *ore tenus* Motion of counsel for Defendants SUTTON and RAINWATER to allow the Answer, Motion for Summary [257] Judgment and Memorandum of Law heretofore filed for those Defendants to stand as the pleadings for Defendant ADAIR is GRANTED.

7. The *ore tenus* Motion of Defendant GERSTEIN to allow his Answer, Motion for Summary Judgment and Memorandum to apply to the intervening Complaint is GRANTED. The pleadings of the Defendant GERSTEIN shall be deemed applicable to the intervenors.

DONE and ORDERED in chambers, at Miami, Dade County, Florida, this 13 day of May, 1971.

/s/ James Lawrence King

U. S. DISTRICT COURT JUDGE

[328]

[Filed June 8, 1971]

[TITLE OMITTED]

DEPOSITION OF JAMES REAGAN, JR.

The oral examination of James Reagan, Jr., taken pursuant to Notice of Taking Deposition on behalf of the Plaintiffs, before Melvin Gross, a Notary Public in and for the State of Florida at Large, on Thursday, the 3rd day of June, 1971, at 3:55 o'clock p.m., at the Office of the Public Defender, the Hon. Phillip A. Hubbart, 1351 Northwest 12th Street, Miami, Florida.

[329] APPEARANCES:

HON. PHILLIP A. HUBBART,
Public Defender, and
BENNETT H. BRUMMER, ESQ.
Assistant Public Defender, and
BRUCE ROGOW, ESQ. of
Legal Services,
622 Northwest 62nd Street,
Miami, Florida.
On behalf of the Plaintiffs.

HON. RICHARD E. GERSTEIN,
State Attorney.
By: JACK R. BLUMENFELD, ESQ.,
Assistant State Attorney.
On behalf of the Defendant Reagan.

BARRY RICHARD, ESQ.
Assistant Attorney General,
1350 Northwest 12th Avenue,
Miami, Florida.
On behalf of the Defendants
Rainwater, Sutton and Adair.

ALAN T. DIMOND, ESQ.
Assistant County Attorney,
1626 Dade County Courthouse,
Miami, Florida.
On behalf of Defendants
Sandstrom and Reagan.

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Witness	Direct	Cross
James Reagan, Jr.	3 (H)	—
	8 (R)	—
	15 (H)	—
	19 (R)	—
	22 (H)	—
	23 (R)	—

[331] Thereupon

JAMES REAGAN, JR.

a Defendant herein, was called as a witness by the Plaintiffs and, after having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. HUBBART:

Q Would you state your name and official position, please?

A A. J. Reagan, Jr. I am the Administrative Officer for the State Attorney of this Judicial Circuit.

Q How long have you been so employed?

A About 20 months.

Q Mr. Reagan, at my request, did you make a search of the files and records of the State Attorney's Office to determine how many criminal charges had been no actioned by the State Attorney for the period of January 1st, 1970 through March 31st, 1971?

A I had it done under my direction.

Q Let me show you a memorandum, for the purpose of refreshing your recollection, concerning [332] the results of that search of the records. First of all, while you are looking at that, and while your Counsel is looking at that, could you tell me what a No Action Notice is?

A Yes. It is a statement by the State Attorney that he does not intend at this time, or at that time, to prosecute further a particular charge upon which a Defandant has been booked by a police officer.

Q And the determination is made by the State Attorney that there is not sufficient evidence at that time to proceed on that criminal charge?

A That is correct, or for some other reason. There might be some impediment to the prosecution at that time.

Q Could you tell me the results of this search of the records and this investigation that you made?

A Yes. We found that during the period of January 1st, 1970 through March 31st, 1971, we filed No Action Notices on eleven hundred and sixty-five individual charges.

Q Would you say that the vast majority [333] of these No Action Notices are the results of police officers arresting Defendants where there was not sufficient evidence to justify the filing of the charge,

A That is correct.

Q Could you tell me what the procedure is in the State Attorney's Office, as to how a case is No Actioned? What procedures are taken by the office before a determination is made that a charge should be No Actioned?

A Well, when the complainant appears before our Assistant to file the formal charge, to give us an affidavit concerning the facts of the case, the Assistant at that time evaluates the evidence —

Q When you say Assistant, you mean an Assistant State Attorney?

A That is correct. He evaluates the evidence and makes a determination of what the proper charge to file is. If there is a charge that we do not intend to file, then he will initiate this No Action Notice. It is then reviewed by the Chief of our Complaint Division.

[334] Q He is also an Assistant State Attorney?

A That is correct. And it is finally reviewed by the State Attorney, Mr. Gerstein.

Q So it goes through three separate people; two Assistant State Attorneys and the State Attorney himself, in determining whether or not a particular charge made by a police officer should be No Actioned, is that correct?

A That is correct.

Q When a decision is made that a charge will be No Actioned, then who is notified, if anybody?

A Well, we immediately notify the jail, if the Defendant is incarcerated. We send the original of the No Action to the Shift Commander of that particular shift of the jail. A copy is filed with the Clerk of the Criminal Court of Record and a copy is sent to the arresting officer, or the booking officer, and we keep a copy of it.

Q Now, if a Defendant is booked in on, say five charges, and there is a determination that three of these charges should be No Actioned, as I [335] understand the procedure, you would then notify the jail, if he is incarcerated, that you are going to No Action three of the five charges, and then you file an Information charging the Defendant with the remaining two charges?

A That is correct.

Q So the bonds that have been set by the Committing Magistrate, or from the Master Bond List, whatever, on the other three charges that you have No Actioned, would be dropped, is that correct?

A That is correct.

Q And the bonds would remain on the two charges that you filed?

A Well, no, it depends on what you mean by a bond. Do you mean if the bond would remain had the Defendant been released from jail?

Q I am talking about—

A —and already posted bond?

Q I am talking about incarcerated Defendants?

A No. The charges would be removed from the jail card and he would not be required to post bond on those charges, that is correct.

[336] Q So the bond would be dropped on the three charges and the other two charges he would have to post a bond in order to get out of jail, is that correct?

A That is correct.

MR. HUBBART: I have no further questions.

BY MR. ROGOW:

Q Mr. Reagan, how soon after a person is arrested does the police officer present himself before the State Attorney to file the Information?

A It varies in individual cases. From one day to several days.

Q When you say several days, more than five?

A On occasions, yes.

Q More than a week?

A On occasions, yes.

Q More than ten days?

A On occasions, yes.

Q More than two weeks?

A On occasions, yes.

Q More than a month?

[337] A I know of no such length of time as that.

Q But it would be somewhere between two weeks and a month that you have seen cases where no complainant presented himself to the Assistant State Attorney?

A I cannot recall of anything over two weeks, personally. Of course, I am not saying there have not been occasions. We have had rather extensive followup procedures to see that that does not happen.

I have one girl who does nothing all day but call police officers and say, "You arrested this man, come in and file."

Q How soon after the arrest does she begin to make the followup telephone calls?

A The next day. We have a rather elaborate system of cross-indexing our complaint. When a police officer comes to file, he is given a slip which is called a Referral Slip. It is a multicopy form and it has such information on it as the Defendant's name, the nature of the complaint, the person who is filing the complaint. We cross-index [338] these by both complaint and defendant.

The original slip goes with the complainant to the Assistant State Attorney. He takes the slip from him and, on the back of it, indicates what action he has taken on the complaint. If he intends to file the Information, he will write, "Information filed."

This slip is then routed back through this young lady in our Jail Records Section. She makes the followup call as soon as she gets the slip. She says, "The case is filed."

She then drops that one from consideration and follows up only on the ones that she hasn't got an Information on.

Q Those are only for jail cases?

A That is correct.

Q If a man is out on bond, there is no procedure to encourage the police officer to come in and file the Information right away?

A Unfortunately, I don't have the personnel for that sort of followup.

Q After a complaining witness, or a complaint is made, the police officer comes in and talks to an Assistant State Attorney, and then the [339] Assistant State Attorney prepares the Information, if he thinks one should be filed, is that correct?

A That is correct.

Q What does he do after that with that Information? Where does he go with that Information?

A First it goes through our Jail Records Section, as I mentioned before. The booking sheet is attached to the file at that point in time. It then goes to a processing section, to make sure that everything necessary for the prosecution of this case is contained in it.

Q How long does this processing take? That is what I am getting at.

A In jail cases, we expedite them anywhere from 24 to 72 hours.

Q What happens in these 24 to 72 hours?

A The assistant takes the complaint, the complaint

is processed for other information, such as corporate certificates or anything that we might need in court. Birth certificates, things of this nature. Then it is typed. Then it is sent back to the Assistant State Attorney that took the complaint for his approval.

[340] If it is proper, he initials it. It is then reviewed by the Chief of our Complaint Division who also initials it. Then it is sent to Mr. Gerstein, who signs it. It is then filed with the Clerk of the Criminal Court of Record.

Q You say that at the outside it is 72 hours?
A On jail cases, yes.

Q On jail cases?
A We allot absolute, top priority to jail cases. And the least priority we have, of course, are people out on bond.

Q When the Information is finally signed by Mr. Gerstein, or one of the other Assistants, it is then sent up to the Clerk of the Criminal Court of Record?
A That is correct.

Q It is then out of your hands at that point?
A That is correct.

Q You have no further contact with the Information, other than the general processes of the Court?
[341] A Well, except in so far as we prepare the calendar. As soon as the information is divisioned, by that I mean that a Judge is assigned to it and a case number is assigned to it, the Clerk notifies us of these two factors and we then set the jail cases. We then set it on the next day's calendar for arraignment.

Q So then you are depending upon when the Clerk gets the calendar and assigns it to a Judge?
A Before we can set it for arraignment, that is correct.

Q That is out of your control? That is strictly in the Clerk's control?
A That's right.

Q What happens if someone is arrested on Friday? Does that increase the length of time which the Information will be filed because of the weekend?
A Yes.

Q So that would increase the 72 hours to approximately two more days?
A You are talking about working days?

Q Yes.
[342] A Yes. It would be the nearest working day for our office.

Q So if a person were arrested on Friday, the Information might not be filed until the next Monday?
A It is possible.

Q And in bond cases, there is no timetable that you can give us?
A No, not at all.

Q Do you have any idea of the lag between arrest and —
A We try to keep within a three-week period. In other words, we have the Information filed three weeks after the arrest, I would say, 95 per cent of the bond cases.

Q Do you have any statistical breakdown on the percentage of cases in which you do have filed within 72 hours?

A No, sir, I don't.

Q Are there many cases which go beyond 72 hours?

A That is hard for me to say, Mr. Rogow. I really don't know.

[343] MR. BLUMENFELD: You are referring to these eleven hundred and sixty-five No Action Notices and this procedure refers to direct files, is that correct?

THE WITNESS: That is correct. Where arrests had been made without warrants.

MR. BLUMENFELD: And if the officer elects to go to the Justice of the Peace and there is a bind-over from the Justice of the Peace and the Assistant elects not to file it, that is not included in these eleven hundred and sixty-five No Action Notices?

THE WITNESS: That is correct, it is not included.

MR. BLUMENFELD: That is another form of notice, is that correct?

THE WITNESS: That is correct.

BY MR. HUBBART:

Q Mr. Reagan, where the police officer does not file directly with the State Attorney's Office, but goes through the Justice of the Peace Court and files a com-

plaint there, could you tell us what the procedures are, in so far as the State [344] Attorney's Office is concerned, after the case has been bound over? How do you handle that?

A Certainly we — the Justice of the Peace transmits all of these papers to the Clerk of the Criminal Court of Record.

Q After they held a preliminary hearing on the matter?

A That is correct. This is assuming there is a bind-over. The Clerk of the Criminal Court of Record sends us copies of all these papers. It is assigned to an Assistant who investigates, to determine the proper charge to file. After that determination is made, an Information is filed in that particular case. In this instance we already have a division and a case number so we don't have the communication problem.

In the event that the Assistant decides that there is insufficient evidence to file an Information, or for any other reason he declines to file an Information, he institutes a Notice called a No Information. This is a report similar to a No Action Notice. He sets forth the reasons why he is declining to file an Information in this case.

[345] It is approved the same way the No Action is approved. Then the oral announcement is made in open court and that closes the JP bind-over, in so far as the Criminal Court is concerned.

Q What is the lag in time, between the time of arrest and the JP bind-over case, and the time that the JP

finally gets the papers to you and you file an Information against the Defendant? Do you have any approximation on that?

A Anywhere from seven days to six weeks. Yes.

Q And that is between the time of the arrest of the Defendant and the time of the filing of the Information?

A That is correct.

Q Could you give us an approximation as to the length of time in a No Action case, the length of time between the time of the Defendant's arrest and the time that the matter is finally No Actioned?

A I would say, in the great majority of cases, between three and five days.

Q Of course, a weekend arrest would lengthen that time by two days?

[346] A I am speaking of working days.

Let me point out, too, that most of these No Actions don't terminate the arrest. In other words, something is filed.

Q That was just like I was talking about the five charges where you may drop three and file on two, in which case the bond is dropped on the three for the incarcerated defendants?

MR. BLUMENFELD: That likewise holds true on No Information.

MR. REAGAN: On a No Information, there is another problem involved. The JP's, historically, have only

one charge per case. They make separate cases out of every affidavit. They only put one charge on an affidavit. So if the police officer goes in and charges a man with breaking and entering and grand larceny from the house he broke and entered, that comes out to two cases in the JP Court. It goes to the Criminal Court and it stays two cases.

Once it gets to us, we consolidate it by filing one Information on one of the cases, charging both crimes and we have to No Information the [347] second case.

It is really a misnomer. That is, we are filing a No Information in one cause of action but we are terminating the second case for the record. And that happens in a great number of cases.

Q The Clerk of the Criminal Court of Record of Dade County is taking over the printing and preparing of the calendar, are they not?

A Hopefully.

Q That will happen this summer. So that you will no longer have the responsibility of notifying the Clerk as to a particular Defendant that you filed an Information on, that you need the division and the number?

A That is correct.

Q And then putting him on the calendar shortly after you get that Information back from the Clerk?

A That is correct.

MR. HUBBART: That's all I have.

BY MR. ROGOW:

Q Along the same lines, Mr. Reagan, after you file the Information with the Clerk, how [348] long does it take him, if you know, to assign it to the division, get it on the calendar, and then get it back to you so that you will know it is going to appear in court?

A That varies greatly. From as little time as the same day.

If we file an Information early in the morning, it is possible that we would be notified that afternoon of the division, the number — I have also seen the work backlogged so that it takes as much as a week.

Q Between the time you bring it over there and the time it is back on the calendar?

A Right.

MR. BLUMENFELD: No, not that it gets back on the calendar, that we get notified of the case number and the division so that we cannot put it on the calendar.

Q (By Mr. Rogow) How long after you get notified does it take you to put it on the calendar?

A We put it on the calendar the next available day. Of course, you understand, if we get [349] this notice after three o'clock in the afternoon, then it cannot go on the next day's calendar. You have got another 24 hour period.

Q What I want to try to get from you is that at the time the complaining party comes to you, everything starts at that time for you?

A Yes.

Q There is nothing you can do before that? From the time the complaining party comes to you, how much time elapses, usually, before the case is put on the calendar and the Defendant appears in court?

A My notice would be — the average would be between ten and fifteen days.

Q Ten and fifteen days?

A Yes.

Q Plus whatever time it took for the complainant to come into your office?

A That is correct.

Q And if the man is in jail, he stays in jail during all that time and he doesn't see a Judge at all in that time, except for the bonding judge that he saw the first morning?

[350] A That is correct.

(Thereupon a discussion was held off the record.)

BY MR. HUBBART:

Q These No Actions figures that you have given us, the eleven hundred and sixty-five, is that in reference to incarcerated Defendants?

A No, sir. Not all of these are incarcerated Defendants.

MR. BLUMENFELD: Excuse me. Not all of these are Defendants. Not all eleven hundred and sixty-five are Defendants. That is eleven hundred and sixty-five counts.

Q (By Mr. Hubbart) Of the eleven hundred and sixty-five, from the No Actions filed from January 1st, 1970, until March 31st, 1971, this refers to the incarcerated Defendants as well as non-incarcerated Defendants?

A That is correct. We also use this in order to clear bonds. For example, a Defendant is arrested and posts a bond on five charges, we only elect to prosecute him on two charges, and in order to release the bond on the other three charges, we [351] use this vehicle of a No Action.

Q Do you have any idea, any approximation as to the number of incarcerated Defendants who are incarcerated—

Let me rephrase that. There are eleven hundred and sixty-five individual charges; do you have any idea of what percentage would involve incarcerated Defendants?

A No, sir, I don't.

BY MR. ROGOW:

Q Mr. Reagan, do you have any idea of how many cases are nol pros'd after an Information is filed? In other words, somewhere along the way a decision is made by the State Attorney's Office not to proceed after the Information is filed?

A Not in that particular category. I have statistics on how many cases are terminated by dismissal, nol pros'd or No Information.

Q Could you get those statistics for us, unless you have them in your head?

A No, I haven't. If you will excuse me, I will get them now.

Q Are they written?

[352] A Yes, they are in writing.

Q Would you give us a memorandum on that, where your statistics show that, and we will attach that as an exhibit to the deposition?

MR. BLUMENFELD: You want the calendar year 1970 as a base?

MR. HUBBART: That is all right. Could you give us any breakdown, also, on these eleven hundred and sixty-five, how many of these involved incarcerated Defendants, if there is any way of determining that?

THE WITNESS: I could count them.

MR. HUBBART: I would like for you to do that, if you don't mind.

THE WITNESS: I don't mind.

MR. HUBBART: I have no further questions.

MR. ROGOW: No further questions.

MR. BLUMENFELD: No questions.

(Reading, signing and notice of filing were waived by the witness.)

(Thereupon the taking of the deposition was concluded at 4:15 p.m.)

CERTIFICATE OF NOTARY

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

I, MELVIN GROSS, a Notary Public in and for the State of Florida at Large, hereby certify that I reported the deposition of JAMES REAGAN, JR., at the time and place hereinabove set forth; that the witness was first duly sworn by me; that the foregoing pages numbered from 1 to 24, inclusive, constitute a true and correct transcription of my stenographic report of the deposition of said witness.

I FURTHER CERTIFY that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected with the action, nor financially interested in the action.

WITNESS my hand and seal in the City of Miami, Dade County, Florida, this 6th day of June, 1971.

/s/ Melvin Gross

Notary Public

[353]

[Filed June 9, 1971]

economic opportunity
Legal
Services
Program, inc.

model cities office
622 n.w. 62nd Street
miami, florida 33150
telephone 759-1608
(area code 305)

June 9, 1971

Clerk
United States District Court
300 N.E. First Avenue
Miami, Florida

RE: PUGH V. RAINWATER
Case No. 71-488-Civ-JLK

Dear Sir:

Enclosed please find a "Caseload Report for the Calendar Year Ended December 31, 1971" from the office of the State Attorney for the Eleventh Judicial Circuit. This is to be filed as an exhibit to the deposition of A. J. Regan, Jr., already on file with the Court.

Very truly yours,

/s/ Bruce S. Rogow

BRUCE S. ROGOW, ESQUIRE

cc: Jack R. Blumenfeld, Esquire
Alan Diamond, Esquire
Barry Richard, Esq.
BSR/mlj

[354]

STATE ATTORNEY, ELEVENTH JUDICIAL CIRCUIT CASELOAD REPORT FOR THE CALENDAR YEAR ENDED DECEMBER 31, 1970

Cases	In Process Fiscal Year 1/1/70	Add New Cases for Quarter— From Informations	and Indictments	Dispositions Since 1/1/70	In Process At Period 12/31/70
Capital Offenses	65	93	158	90	68
Other Non-Capital Felonies	21,403	12,804	34,207	5,401	28,806
Misdemeanors	12,760	3,741	16,501	2,365	14,136
TOTAL CASES	34,228	16,638	50,866	7,856	43,010
TOTAL NUMBER of PERSONS NA					
TOTAL NUMBER OF CASES BOUND OVER					

Dispositions	Totals
No True Bills	
Nolle Pros	194
Plea of Guilty	(3,234)
Convictions	4,716
Acquittals	1,565
*Other (Absentee Docket, etc.)	1,373
TOTAL DISPOSITIONS	7,856

*Guilty Pleas included in convictions.

(*) If these cases are reactivated at a future date, treat as new cases.

Other Matters	
Appeals to Higher Courts	311
Bond Validations	15
Bond Estreatures	1,918
Extradition Proceedings	68
Rule I Motions	160
Criminal Hearings	12,771
Habeas Corpus Hearings	159
Uniform Support Procedures	1,250
Other Cases Not Enumerated (Specify)	1,696
TOTAL OTHER MATTERS	18,348

(Signature)

Note: One form may be used for all four quarters. Just erase or Sno-Pake totals from the previous quarter, list the new quarter, then add Cases In Process at the beginning of the year; after subtracting dispositions since the beginning of the year, a new total of Cases In Process at the ending of the new quarter will be obtained.

Distribution: Four copies to Judicial Administrative Commission — which will retain one, and forward one each to the Governor's Office, the Attorney General, and the Budget Director.

[TITLE OMITTED]

[Filed July 6, 1971]

MOTION FOR SEPARATE TRIALS AND TRANSFER OF PARTIES AND MEMORANDUM

Plaintiffs and Defendants, James Rainwater, Ruth Sutton, and Sylvester P. Adair, hereby jointly move this Court to order a separate trial on the issue of bail, raised by Count III of the Complaint and to grant leave to said defendants to transfer from party defendants to party plaintiffs on the issue of preliminary hearings, raised by Counts I and II of the Complaint, and as grounds therefor states:

1. The two issues are factually and legally unrelated.

2. Said defendants in their memoranda and in oral argument have argued in favor of the plaintiffs' position on the preliminary hearing issue.

3. It is apparent from the pleadings that judgment against the defendants Rainwater, Sutton and Adair is not necessary in order for the plaintiffs to obtain the relief they seek on the preliminary hearing issue.

4. Transfer of the defendants Rainwater, Sutton and Adair from parties defendant to parties plaintiff would clarify the positions of the parties for the remainder of the

litigation in [450] this court and on appeal should one be taken.

Respectfully submitted,
BRUCE S. ROGOW, ESQUIRE
Legal Services of Greater
Miami, Inc.
622 N.W. 62nd Street
Miami, Florida 33150

PHILLIP A. HUBBART,
ESQUIRE
Public Defender of the Eleventh
Judicial Circuit
Metropolitan Justice Building
1351 N.W. 12th Street
Miami, Florida 33125

By /s/ Phillip A. Hubbart

ROBERT L. SHEVIN
Attorney General

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General
1350 N.W. 12th Avenue, Rm 530
Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Separate Trials and Transfer of Parties was mailed to the parties listed below this 25th day of June, 1971.

Howard Levine and
James Jorgensen
Legal Unit
1320 N.W. 14th Street
Public Safety Dept.,
Miami, Florida

Bruce Rogow, Esq.
Legal Services of Greater
Miami
622 N.W. 62nd St.
Miami, Fla., 33150

Judge James Rainwater
1351 N.W. 12th St.
Room 444
Miami, Florida

Alan Diamond, Esq.
Assistant County Attorney
73 West Flagler Street
Miami, Florida

Judge Sidney Segall
1351 N.W. 12th St.,
Miami, Florida

Morton S. Perry, Judge
1351 N.W. 12 St.
Room 440
Miami, Florida

Ralph B. Ferguson, Jr.,
Justice of the Peace
2001 N.W. 7th Street
Miami, Florida

Charles Snowden
Justice of the Peace
12210 N.W. 7th Ave.
Miami, Fla.

Sylvester P. Adair
Justice of the Peace
432 Washington Avenue
Homestead, Florida

Ruth L. Sutton
Justice of the Peace
220 Miracle Mile
Coral Gables, Fla.

Rocky Pomerance
Chief of Police
City of Miami Beach
100 Meridian Avenue
Miami Beach, Florida

Jason Berkman
Justice of the Peace
407 Lincoln Road
Miami Beach, Fla.

[451]

Bernard E. Garmire
Chief of Police for the
City of Miami
1145 N.W. 11th Street
Miami, Florida

David Maynard
Chief of Police for the
City of Hialeah
Hialeah, Florida

Alan H. Rothstein
City Attorney
Larry J. Hirsch,
Asst. City Attorney
65 S.W. 1st Street
Miami, Florida 33130

Jack R. Blumenfeld, Esq.
Asst. State Attorney
1351 N.W. 12th Street
Miami, Florida 33125

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General
Miami Division

[469]

[TITLE OMITTED]

[Filed July 16, 1971]

MOTION FOR SEPARATE TRIALS AND TRANSFER OF PARTIES AND MEMORANDUM

Defendant, Charles H. Snowden, hereby joins in the Motion of defendants James Rainwater, Ruth Sutton, and Sylvester P. Adair and plaintiffs, for separate trials on the issues of preliminary hearings and bail and to transfer said defendants from party-defendants to party-plaintiffs on the issue of preliminary hearings and defendant, Charles H. Snowden, hereby adopts the Memorandum filed with said Motion.

ROBERT L. SHEVIN
Attorney General

/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General
1350 N.W. 12th Avenue, Rm 530
Miami, Florida
Attorneys for Defendant,
Charles H. Snowden

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the parties listed below, this 14th day of July, 1971.

Howard Levine and
James Jorgensen
1320 N.W. 14th Street
Public Safety Dept.,
Miami, Florida

Morton S. Perry,
Judge
1351 N.W. 12th St.
Room 440
Miami, Florida

Sylvester P. Adair
Justice of the Peace
432 Washington Avenue
Homestead, Florida

[470]
Judge James Rainwater
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Room 444
Miami, Florida

Alan Diamond, Esq.
Asst. County Attorney
73 W. Flagler Street
Miami, Florida

Judge Sidney Segall
1351 N.W. 12th St.,
Miami, Florida

Phillip A. Hubbart
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Rocky Pomerance
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/s/ Barry Scott Richard

BARRY SCOTT RICHARD
Chief Assistant Attorney General

[488]

[TITLE OMITTED]

[Filed Oct. 12, 1971]

OPINION AND FINAL JUDGMENT

Plaintiffs Robert Pug and Nathaniel Henderson brought this class action, in which plaintiffs Thomas Turner and Gary Faulk have intervened, seeking relief for the alleged deprivation of their rights as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is founded upon 28 U.S.C. 1343 (3), (4) and grows out of a Constitutional attack (42 U.S.C. 1983) upon the procedure whereby plaintiffs were incarcerated, upon information filed by the state attorney, and held for trial in Dade County, Florida, without review by a committing magistrate of the probable cause for their arrest.

The defendants herein are sued in their official capacities (sheriff, police chiefs, state attorney, justices of the peace and judges of small claims courts of Dade County and several of its municipalities) as individuals charged with the responsibility of administering the system under which plaintiffs were incarcerated.

The plaintiffs contend that they have been deprived of a Constitutional right to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offenses with which they are charged.

Under the present procedure the state attorney (or one of his assistants) considers the reports submitted [489] by police officers of the results of their investigations and thereafter files a direct information and issues a capias for arrest of the individual charged with the offense. The person may be already in jail or is then arrested and waits in jail until either he is released on bond or is tried. There is no review by a judicial officer as to the probable cause for the arrest and detention of a person charged by the state attorney in a direct information.

Plaintiffs further allege they have been denied their constitutionally protected right to equal protection of the law in that in certain instances the police will process cases through the offices of the justices of the peace instead of going to the office of the state attorney as was done herein. A justice of the peace conducts a preliminary hearing for probable cause whereas the state attorney does not. It is contended that the unfettered discretion of the police in deciding whether to file criminal charges with the justice of the peace or the state attorney, results in an arbitrary and unreasonable creation of two classes of arrested persons, those who are afforded a preliminary hearing and those who are not.

Lastly plaintiffs contend that the setting of a monetary bail bond as a condition for the release of persons financially unable to post the bond creates two classes of arrested persons and discriminates against poor persons, thereby violating their right of equal protection of the law. Plaintiffs Henderson, Turner and Faulk allege they remain imprisoned because of their impoverished financial conditions.

In the case of plaintiff Pugh no bond has been set pursuant to F.S.A. Constitution, Article 1, §14 since the main pending charge is robbery, a crime punishable by life imprisonment, F.S.A. 813.011.

[490] On May 13, 1971 the Court, upon the request of all counsel took the plaintiff's pending motions for summary judgment under advisement for the purpose of permitting the Florida Legislature an opportunity to consider pending legislation providing for the type of probable cause hearing sought herein. The Legislature adjourned without enacting the proposed statute and this case was set for final hearing. In the course of arguing their respective positions during final hearing, all counsel agree that there are no issues of fact to be resolved in this suit and that the issues can, and should, be determined as a matter of law.

Consistant with the philosophy of non-intervention in state criminal procedures the Court afforded the parties a reasonable time, subsequent to the final hearing, within which to attempt to agree upon the implementation of a system securing to all persons the protection of judicial review of the probable cause for arrest. This proved fruitless. The time of restraint is past and the Court has no alternative except to act.

UNDISPUTED FACTS

A person may be charged with a crime in Dade County, Florida, in one of five ways:

(1) A police officer witnesses the commission of a crime, places the accused under arrest and

takes him to jail. Sometime between 24 hours and two weeks later the arresting officer files a sworn affidavit with the office of the state attorney who, then files a direct information and issues a capias against the defendant.

(2) A police officer conducts an investigation of an alleged criminal offense, decides he has sufficient evidence to arrest, and places the defendant in jail. The arresting officer then goes to the state attorney with his affidavit and a direct information is filed against the defendant by the state attorney.

(3) A police officer conducts an investigation but takes the case to the state attorney before making the arrest and, after issuance of the direct information, arrests the defendant and places him in jail.

(4) A police officer conducts an investigation, [491] presents the matter by affidavit to a justice of the peace, who issues a warrant for arrest and conducts a preliminary hearing to determine probable cause as to the commission of the alleged crime. The defendant is released if no probable cause is found to exist.

(5) The results of an investigation are submitted by the state attorney to the grand jury, which determines probable cause and returns an indictment to a judge. After review, the judge either issues the arrest warrant and causes the indictment to be filed or dismisses the charge.

Under the process outlined in paragraphs 1, 2, and 3 above there is no judicial determination, prior to trial of whether or not there is probable cause to believe that the particular defendant under arrest did in fact, commit the offense for which he is being held in custody. The procedures outlined in paragraphs 4 and 5 provide for a probable cause hearing, by a judicial officer, prior to trial and are not therefore under attack in this litigation.

When an accused person is informed against by the state attorney and arrested, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files his affidavit of facts. In spite of the fact that officers are urged to file their affidavit with the state attorney as promptly as possible periods from twenty-four hours to more than two weeks elapse before the affidavit is filed and processing begins.

The state attorney, between January 1, 1970 and March 31, 1971, decided not to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these "no actions" resulted from arrests on charges lacking sufficient evidence to justify the filing of an information.

Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all of these cases with a tremendous saving of human misery (to all those who had been arrested on insufficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida).

[492] Once the state attorney's office decides to file the information a period of twenty-four to seventy-two hours plus weekends is required to prepare the information for filing with the Clerk of the Criminal Court of Record. The information is then filed and set for arraignment with an average delay of ten to fifteen days from the time the arresting officer appears until the time the defendant is arraigned.*

At no time prior to trial is a defendant who is proceeded against by information afforded a hearing to determine the existence of probable cause. It is the policy of the state attorney to oppose any attempt to secure such a hearing.

JURISDICTION

Where the Federal Court is asked to pass upon the validity of state criminal procedures, the question of jurisdiction requires careful scrutiny. Defendants urge that the Federal Anti-Injunction Statute, 28 U.S.C. 2283, along with the recent Supreme Court decisions in a series of cases led by Younger v. Harris, 401 U.S. 37, 91 S. St. 746 (1971), remove this cause from the Court's jurisdiction. See, Boyle v. Landry 400 U.S. 77, 91 S. Ct. 758, (1971); Dyson v. Stein, 400 U.S. 200, 91 S. Ct. 769 (1971); Samuels v. Mackell, 400 U.S. 66, 91 S. Ct. 674 (1971); Perez v. Ledesma, 400 U.S. 82, 91 S. Ct. 674 (1971); Byrne v. Karalexix, 400 U.S. 216, 91 S. Ct. 777 (1971).

*Although the record does not reflect the ultimate disposition of the direct information cases alone, it does appear that of the total of 7,856 cases disposed of by the state attorney in 1970, there were 198 "nolle pros", and 1,565 acquittals.

The Anti-Injunction Statute provides that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, [493] or to protect or effectuate its judgments", 28 U.S.C. §2283. The Younger case rested not upon an interpretation of this statute and the exceptions thereto but upon "the national policy forbidding Federal Courts to stay or enjoin pending State Court proceedings except under special circumstances", 401 U.S. at 41.

Under Younger, et al as well as under the statute the relief precluded is the enjoining of a prosecution or a declaratory judgment with the same effect, Samuels v. Mackell, supra. Moreover, in each of the Younger cases the requested relief included a declaration of unconstitutionality of a state substantive criminal statute. Plaintiffs at bar ask the Court neither to declare unconstitutional a state statute nor to enjoin a prosecution, but instead pray for a declaration of procedural rights and an injunction from the continued denial thereof. This case is therefore not in conflict with either Younger or 28 U.S.C. §2283. Furthermore, even were the relief requested herein considered to be within Younger, the circumstances of this case would come within the exceptions to that principle.

Mr. Justice Black outlined in Younger the circumstances under which a Federal Court can enjoin a state criminal proceeding. There must be a "great and immediate" "irreparable injury" other than the "cost, anxiety, and inconvenience of having to defend against a single criminal proceeding. There must be a "great and immecannot be eliminated by the defense therein, 401 U.S. at 46, S. Ct. at 751. Although Younger recognizes that

jurisdiction would exist where a state prosecution was brought in bad faith or for harrassment, as in Dombrowski v. Pfister, 380 U.S. 479 (1965), it is clear that these factors are not additional prerequisites to relief but are indicative of irreparable injury. See also Duncan v. Perez, No. 31080, 5 Cir. June 14, 1971. [494] In describing the harassment present in Dombrowski, the Court noted that "[t]hese circumstances . . . sufficiently establish the kind of irreparable injury sufficient to justify federal intervention", 401 U.S. at 48, 91 S. Ct. at 752.

Plaintiffs at bar are challenging the validity of their imprisonment pending trial with no judicial determination of probable cause. These facts present an injury which is both great and immediate and which goes beyond cost, anxiety, and inconvenience. Furthermore, the state has consistently denied the right asserted, so that the injury is irreparable in that it cannot be eliminated either by the defense to the prosecution or by another state proceeding. See Anderson v. State, 241 So.2d 390 (Fla. 1970); Sangaree v. Hamlin, 235 So.2d 729 (Fla. 1970); Montgomery v. State, 176 So.2d 331 (1965); Bangus v. State, 141 So.2d 264 (1962)*. For the reasons stated the Court finds that it has jurisdiction in this cause.

CONSTITUTIONAL QUESTIONS

The principal constitutional issue for determination is, of course, whether one who is arrested and held for trial upon an information filed by the state attorney is entitled to a hearing before a judicial officer on the question of probable cause.

*The case law cited relates only to count I of the complaint. Lengthy consideration of counts II and III is unnecessary in light of the holdings which follow.

The Court is faced with a unique factual situation which does not appear to be controlled by the plethora of cases cited by counsel. Defendants rely on Woom v. Oregon, 229 U.S. 586, 33 S. Ct. 783 (1914) in which the Supreme Court held that an Oregon defendant who was accused by sworn complaint [495] before a committing magistrate had no right to an examination as a condition precedent to the filing of an information by the district attorney. In Woom the Court was concerned with the validity of the information rather than the pre-trial detention. Furthermore, that case did not consider a procedure resulting in lengthy detention after arrest where neither a sworn complaint nor an information had been filed.

It is significant that the Woom case relied on Hurtado v. California, 110 U.S. 516, 4 C. Ct. 111 (1884) holding that a grand jury indictment was not a prerequisite to a felony prosecution, and stating:

> . . . we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." (emphasis added) 110 U.S. at 537, 4 S. Ct. at 122.

Numerous opinions have been cited in which this circuit has held there is no due process right to a preliminary hearing. The issue in each of those cases however, was the validity of the trial as affected by the absence of a preliminary hearing and not the validity of the

pre-trial detention itself. In Scarborough v. Dutton, 393 F.2d 6 (5 Cir. 1968) the Court, upholding a conviction where the defendant had been incarcerated for seven months without a preliminary hearing, stated, "The failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction". 393 F.2d at 7 (emphasis added). See also: Murphy v. Beto, 416 F.2d 98 (5 Cir. 1969); McCoy v. Wainwright, 396 F.2d 818 (5 Cir. 1968); King v. Wainwright, 368 F.2d 57 (5 Cir. 1966); Worts v. Dutton, 395 F.2d 341 (5 Cir. 1968); Kerr v. Dutton, 395 F.2d 79 (1968); cf. Hamilton v. Alabama, [496] 368 U.S. 52, 82 S.Ct. 157 (1961).

In Anderson v. Nosser, 438 F.2d 183 (5 Cir. 1971), even though the Court did not consider the validity of a conviction, the facts were analogous to those in the foregoing post-conviction cases. In each case cited supra the pre-trial detention had ceased to exist, and the trial itself being valid, there was no continuing deprivation of rights. The confinement in Anderson occurred over a period of two to four days with the various federal complaints being filed from three months to fourteen months after plaintiffs' release. Consequently, in Anderson, just as in the post conviction cases the Court was asked to grant relief from a deprivation of rights no longer in effect. That the Anderson Court itself considered the case to come within the post conviction situation is apparent from its reliance upon Kulyk v. U.S., 414 F.2d 139 (5 Cir. 1969), and other cases, all of which turned upon the validity of a conviction, 438 F.2d at 196.

The instant case differs from the foregoing in that this Court is asked to determine the validity of a present

confinement. The complaint herein was filed during plaintiffs' incarceration. Unlike Anderson, the confinement at bar is not an isolated event but is a recurring part of the state sanctioned prosecutorial system. Unless corrected the wrong complained of will continue to infringe upon the rights of the individual plaintiffs and the class they represent.

A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police and/or prosecutor violates the principles which underly this country's founding and which are the essence of the constitutional guarantees of freedom from unreasonable seizure and from deprivation of liberty without due process of law.

[497] The danger inherent in a system of this kind was described by Mr. Justice Frankfurter in McNabb v. United States:

> [L]egislation requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all of the states.
>
> The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience

> has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. 318 U.S. 332, 343-44, 63 S. Ct. 608, 614 (1943).

Over forty years ago the Florida Legislature (1939) enacted a statute requiring any officer arresting without a warrant to take the defendant before a committing magistrate without unnecessary delay, F.S.A. 901.23. Thus we see the requirement for a preliminary hearing is not a new innovation in the law of the State of Florida.

The Fourteenth Amendment provides that no state shall deprive any person of liberty without due process of law. The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 34 S. Ct. 779, (1914). "It is an opportunity which must be granted at a meaninguful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965).

[498] It has been held that a hearing must be given before a drivers license and vehicle registration can be suspended, Bell v. Burson, 91 S. Ct. 1586 (1971); Salkay v. Williams, No. 30090 (5 Cir. June 22, 1971); before prohibiting the sale of liquor to an individual for one year, Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507; before termination of welfare payments (even though a subsequent hearing was afforded), Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970); before garnishment of wages (even though there was a subsequent trial), Snidach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1920 (1969); before a thirty day suspension from a public school, Williams v. Dade County School Board, 441 F.2d 299 (5 Cir. 1971); before refusal of admission to public hospital staff, Sosa v. Board of Managers, 437 F.2d 173 (5 Cir. 1971); and before termination of employment on college faculty, Ferguson v. Thomas, 430 F.2d 852 (5 Cir. 1970). It would appear beyond question that due process demands a preliminary hearing within a reasonable time after an accused has been deprived of his freedom.

In Goldberg v. Kelly, the Court summarized the test for providing procedural due process as follows:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." Joint Anti-Facist Refugee Committe v. McGrath, 341 U.S. 123, 168, 71 S. Ct. 624, 647, (1951) (Frankfurter J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. 254, 262-63, 90 S. Ct. 1011, 1017-18.

In this case the grievous loss is that one's freedom and the countervailing governmental interest is that of the state in avoiding the burden of preliminary hearings. Although the state may incur additional expense in expanding its existing committing system to include hearings for direct information cases, this expense will be more than offset by the savings in jail and [499] trial costs regarding those persons heretofore jailed and/or tried without probable cause. Moreover, these financial considerations are so grossly overbalanced by the prolonged loss of freedom by innocent persons that further comment is unnecessary.

The taxpayers of this community have labored under a near intolerable burden of the spiraling cost of combating crime. The expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community.

A preliminary hearing in direct information cases is compelled by the Fourth Amendment as well as by the Fourteenth Amendment.

The Fourth Amendment provides that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation . . ." It has been established that this amendment is operable upon the states via the due process clause of the Fourteenth Amendment, Mapp. v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961) and that it

applies to arrest warrants as well as to search warrants. Giordenello v. U.S., 357 U.S. 480, 78 S. Ct. 1245 (1958).

The existence of a Fourth Amendment right to a probable cause hearing has been recognized in two opinions of the Court of Appeals for the District of Columbia Circuit. In Cooley v. Stone, 134 U.S. App. D.C. 317, 414 F.2d 1213 (1969) the Court held that a juvenile in the custody of a detention home had the right to a probable cause hearing and cited approvingly the following language of the lower court:

[500] No person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. 414 F.2d at 1213.

In Brown v. Fauntleroy, 442 F.2d 838 (1971) the Court found that the same right applied to a juvenile released pending trial to the custody of his mother. In that opinion the Court emphasized that the basis of the right was in the Constitution and not in the Federal Rules of Criminal Procedure. Of the fact that the accused was not in physical state custody the Court said;

> "[T]he right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody. Appellant accordingly has the right to have the validity of the seizure determined since he will be called to trial for conduct which led to the seizure." 442 F.2d at 842.

Recently the Supreme Court overturned a State Court conviction based upon evidence seized under a search warrant issued by the state attorney general who was the chief investigator and prosecutor in the case. The warrant was held to be invalid under the Fourth and Fourteenth Amendments because not issued by the "neutral and detached magistrate required by the Constitution", Coolidge v. New Hampshire, 400 U.S. 814, 91 S.Ct. 2022 (1971). If a prosecuting official cannot properly issue a search warrant in a case he is prosecuting, then he is a fortiori not a proper person for determining the existence of probable cause to hold an accused for trial.

The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause.

Count II alleges that the system which denies a preliminary hearing to plaintiffs' class while granting [501] a hearing to other criminal defendants is violative of the right to equal protection of the law. Because of the Court's holding that in all direct information cases the accused must be given a hearing as a right of due process and freedom from unreasonable seizure, it is unnecessary for the Court to determine whether the prior system was invalid for failure to afford equal protection of the law. See Troy State University v. Dickey, 402 F.2d 515 (5 Cir. 1968).

Plaintiffs contend in count III that where an accused is financially unable to post the required security for his release pending trial there exists an arbitrary and unreasonable classification based solely upon wealth in viola-

tion of the right to equal protection of the law. The record establishes that it is the policy of defendants to set bonds sufficiently low to allow accused persons their release while assuring their subsequent appearance at trial. The severity of the crime along with the accused's ties to the community, past criminal record, and financial resources are all considered in the setting of bonds. There is no allegation that any bond in question was set in excess of that which the judiciial officer deemed necesary to assure trial appearance.

In contending that they are denied release solely because of their poverty, plaintiffs ignore the other factors distinguishing them from released persons. The record shows that plaintiffs' confinement is not the result of a classification based solely upon wealth, consequently they have not been deprived of their right to equal protection of the law.

The Court recognizes the cooperative attitude of the state authorities and their desire to comply with the law. Obviously they are the individuals most qualified to develop the new procedures required by this order. It is hereby suggested that the assistance of Presiding Circuit Judge Marshall C. Wiseheart in the implementation of this [502] this order would be helpful. It is therefore,

ORDERED and ADJUDGED:

1. That this is a valid class action brought pursuant to Rule 23 (b) (2), Federal Rules of Civil Procedure, on behalf of all persons arrested in Dade County who are or will be proceeded against by direct information of the state attorney.

2. The named plaintiffs shall immediately be given a preliminary hearing to determine probable cause for their arrest by a committing magistrate unless their cases have been otherwise concluded.

3. That defendants shall, within 60 days of the date hereof, submit to the Court a plan providing for preliminary hearings before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct information. The preliminary hearing shall be within a reasonable time of the arrest.

4. Subsequent to final hearing certain motions for summary judgment, severance and transfer of party defendants to party plaintiff were filed. These motions be and the same are hereby denied.

5. The Court retains jurisdiction for a consideration of the plan and enforcement of the provisions of this final judgment.

DONE and ORDERED in chambers at Miami, Florida, this 12th day of October, 1971.

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: Counsel of Record

[542]

[TITLE OMITTED]

[Filed January 25, 1972]

ORDER ADOPTING PLAN TO PROVIDE PRELIMINARY HEARINGS

In its Opinion and Final Judgment in this cause entered October 12, 1971, the Court directed defendants to submit a plan providing for preliminary hearings before a judicial officer in all criminal cases in Dade County wherein prosecution is to be upon direct information of the State Attorney. A single plan having been submitted, that being on behalf of Defendant E. Wilson Purdy, and the Court having provided all parties with the opportunity for oral argument regarding said plan, it is

ORDERED AND ADJUDGED:

I. That the aforesaid plan, as modified by the Court, shall be the official plan for implementation of the Court's final judgment, said modified plan being as follows:

1. The purpose of this plan is to provide every arrested person (hereinafter defendant) who is to [543] be proceeded against by direct information of the State Attorney immediate access to a committing Magistrate who shall conduct a first appearance hearing for the following purposes: (A) To advise the defendant of the charges against him; (B) To advise the defendant of his rights under the Constitution of the United States and the Constitution of the State of Florida; (C) To appoint

counsel if the defendant is indigent; (D) To set a date and time for a preliminary hearing to determine whether there is probable cause that the defendant committed the offense with which he is charged.

2. All procedings will be conducted pursuant to Florida Statutes, the Florida Rules of Criminal Procedure and the applicable case law.

3. All arrested persons who are subject to "booking" will be booked at the Metropolitan Dade County Jail.

4. All officers who make an arrest, with or without a warrant, shall immediately take the arrested person, or where that is not feasible cause him to be taken, before a Magistrate for a first appearance hearing. Absent extreme circumstances said hearing shall take place within three (3) hours of the time the defendant is taken into custody.

5. The Chief Judge for the Eleventh Judicial Circuit in and for Dade County shall designate sufficient Judges, who will sit as a committing magistrate division.

6. A committing magistrate will be available for first appearance hearings on a twenty-four (24) hour basis seven (7) days per week.

[544] 7. All first appearance hearings will be held in the courtroom or chambers of the designated committing magistrate.

8. At the first appearance hearing the magistrate will set the time and place for a preliminary hearing to determine whether there is probable cause to hold the defendant for trial. If both the State of Florida, represented by the office of the State Attorney, and the defendant, properly represented by counsel, are prepared to proceed with the preliminary hearing, the magistrate shall immediately conduct such a hearing. If either party is not prepared for the preliminary hearing said hearing shall not be set to take place within a period of twenty-four (24) hours after the first appearance hearing unless the parties agree to a time within that period. Except in extreme circumstances the preliminary hearing will be set to take place not more than four (4) days after the first appearance hearing for all defendants who are unable to post bond and do not qualify for the Pre-Trial Release Program and not more than ten (10) days after the first appearance hearing for all other defendants.

9. A defendant may waive his right to a preliminary hearing or agree to a hearing date that is later than the time hereinabove set forth, provided that such a waiver is signed by the accused and his legal counsel, if any.

10. There will be provided sufficient assistant state attorneys available at the first appearance hearing and at the preliminary hearing to assist officers in drafting the charges against the arrested person and to otherwise represent the position of the State of Florida at said proceedings.

[545] 11. There will be provided sufficient assistant public defenders to represent, both at the first hearing

and at the preliminary hearing, those persons who are entitled to public representation.

12. The magistrate shall allow the defendant a reasonable time to obtain counsel and for such purposes shall, if necessary, postpone setting the preliminary hearing for a period not to exceed forty-eight (48) hours. He shall also, upon request of the defendant, require an officer to communicate a message to such counsel in Dade County as the defendant may name. The officer shall with diligence and without cost to the defendant perform that duty. If the defendant desires private counsel and private counsel cannot be obtained within a reasonable time the magistrate shall continue the cause and release the defendant on his own recognizance, in the custody of another or on bond, or the magistrate may order incarceration of the defendant. If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days. If the magistrate finds the defendant to be indigent, he shall appoint a public defender to represent him.

13. Upon information or complaint under oath the magistrate may arraign the defendant and may accept a plea of guilty or nolo contendere to any offense within the jurisdiction of the Court. If the charged offense is not within the jurisdiction of the Court the magistrate shall set a hearing for the purpose of accepting the plea before a Court with appropiate jurisdiction.

14. Preliminary hearings may be held in any court of competent jurisdiction, such location is to be set by the magistrate at the time of the first appearance hearing.

[546] 15. The magistrate, where he has appropriate jurisdiction, may, upon appropriate plea, sentence any defendant either at the first appearance or at the preliminary hearing.

16. If, at the time of the preliminary hearing, it appears to the magistrate that there is probable cause that an offense has been committed and that the defendant committed it, the magistrate shall forthwith order the defendant to answer to the Court having trial jurisdiction; otherwise the magistrate shall discharge the defendant.

17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge.

18. If the magistrate orders the defendant to answer to the Court having trial jurisdiction, he may release the defendant on his own recognizance, in the custody of another, or on bond, or he may order the defendant to be incarcerated. For purposes of the preliminary hearing the magistrate shall issue such process as may be necessary to secure the attendance of witnesses within the state for the state or the defendant. All witnesses shall be examined in the presence of the defendant and may be cross examined. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf and in such a case he shall be warned in advance by the magistrate that anything he may say can be used against him at a subsequent trial. He may be cross examined and whether

he testified or not any witness produced by him shall be sworn and examined.

[547] Prior to the examination of any witness in the cause the magistrate may, and on request of the defendant shall, exclude from the courtroom all other witnesses who have not yet testified. The magistrate may cause the witnesses to be kept separate and prevented from communicating with one another until all are examined.

At the request of the prosecuting attorney or the defense attorney the testimony of the witnesses and the defendant, if he testified, shall be recorded verbatim stenographically or by mechanical means and shall be transcribed, and furnished to the requesting attorney. If the testimony or any part thereof is transcribed at the request of either party, a copy of such testimony shall be furnished at cost to the other party. If the defendant is indigent, transcriptions shall be furnished free of cost upon request by the defense attorney.

When the magistrate has discharged the defendant or held him to answer he shall transmit within forty-eight (48) hours thereafter to the clerk of the court having trial jurisdiction of the offense the following information as applicable:

(a) The name of the incarcerated person awaiting trial, the date of incarceration and the charge.

(b) The complaint and the warrant.

(c) The written testimony of the witnesses if transcribed and filed.

(d) The recognizance or undertaking for the appearance of the defendant.

(e) A copy of the order discharging or holding the defendant.

[548] (f) Every article, writing, money or other exhibits received in evidence provided, however, that such article, writing, money or other exhibits so used in evidence before said magistrate may be returned to the owner thereof upon a written order of the magistrate unless the State objects thereto in which case the trial Court will resolve the issue.

19. The following sanctions shall be imposed for failing to bring the defendant before a committing magistrate and/or for failure to hold a preliminary hearing:

(1) If, within twenty-four (24) hours after a defendant's arrest, a first appearance has not been held and/or a magistrate has not set bail for a defendant charged with an offense bailable as of right, the defendant shall immediately be released on his own recognizance.

(2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges

shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this [549] provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal.

Postponements may be granted in accordance with the Florida Rules of Criminal Procedure after notice to the parties and an opportunity to be heard.

20. In case of conflict between this plan and applicable Florida Statutes, Florida case law, or the Florida Rules of Criminal Procedure the three last mentioned authorities will apply to the extent that they are not inconsistent with the Court's Opinion and Final Judgment of October 12, 1971.

21. In order to accomplish the purposes of this plan the details herein may be altered as required to keep the system functioning without further approval by this Court.

22. This plan is not intended to apply to violations charged under the various municipal codes.

23. Each law enforcement agency will be responsible for the transportation of its own prisoners and it is not anticipated that this is a responsibility of Metropolitan Dade County.

24. This plan shall be put into effect within ninety (90 days from the date of this order.

II. The Motion of Defendant Gerstein for Rehearing and/or Clarification be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Florida this 25 day of January, 1972.

/s/ James Lawrence King

James Lawrence King
UNITED STATES
DISTRICT JUDGE

[1]
Copy to: Judge King

71-448-CIV-JLK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-1585

ROBERT PUGH and NATHANIEL
HENDERSON, ET AL,
v.

JAMES RAINWATER, ET AL.

Appeal from the United States District Court
for the Southern District of Florida

(OCTOBER 24, 1972)

Before BROWN, Chief Judge, TUTTLE and
INGRAHAM, Circuit Judges.

PER CURIAM:

It appearing that the order of the trial court in this case was stayed pending appeal by a panel of this court, and the case having now been argued in open court and submitted, it is now

ORDERED that the stay heretofore entered is hereby VACATED.

It having been made to appear on oral argument that, with the substantial acquiescence of the Attorney General of the State of Florida, measures have now been instituted to afford some of the relief relating to hearings to determine probable cause for arrest of members of the class represented by named plaintiffs, the trial court is directed to compare in detail the plan incorporated in its order with the present practice, and make specific findings in which it determines to what extent the present practice falls short of meeting constitutional requirements. A copy of its [2] findings shall be furnished to counsel and to this court.

Pending the completion of such inquiry, the trial court may put into effect such parts of its plan as are consistent with the proposed plan submitted to the court by Sheriff Purdy.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Carol A. Gaudet
Deputy

New Orleans, Louisiana
OCT 24 1972

[3]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 71-448-Civ-JLK

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf of all others
similarly situated, et al,
Plaintiffs,

vs.

JAMES RAINWATER, et al,
Defendants.

FINDINGS AND CONCLUSIONS RELATIVE THE COMMITTING MAGISTRATE SYSTEM OF DADE COUNTY, FLORIDA

[Filed February 16, 1973]

I

HISTORY

This action brought almost two years ago by Florida prisoners held for trial without ever having received an impartial judicial determination of probable cause for their detention, now comes before the court for detailed findings on the extent to which present state practice falls short of meeting constitutional requirements. In an order of October 12, 1972, this court initially ruled that both the fourth amendment and the due process clause of the fourteenth amendment require a prompt hearing before

a neutral and detached judicial officer for individuals held for trial solely upon an information filed by a single state attorney. Pugh v. Rainwater, 332 F.Supp. 1107 (S.D. Fla. 1971).

The court allowed defe' dants both before and after that ruling an opportunity to voluntarily bring Florida practice into compliance with basic constitutional standards. After this case was initiated on March 22, 1972, the court permitted the pre-trial schedule to be protracted in order that the 1971 Florida Legislature might have an opportunity to consider and act upon the issue. Likewise, the court's [4] October 25 order postponed the question of implementation to provide all defendants 60 days within which to avail themselves of the opportunity to submit proposals concerning what sort of system for providing prompt preliminary hearings by an impartial judicial officer should be adopted in Dade County, Florida. The only proposal submitted in response to the court's mandate, (which came from defendant E. Wilson Purdy, Sheriff of Dade County) suggested the creation of acommitting magistrate system.[1] In the absence of alternative proposals, the Purdy Plan, as it came to be known, was substantially adopted on January 25, 1972 after careful deliberation by the court. Pugh v. Rainwater, 336 F.Supp. 490 (S.D.Fla. 1972).

Implementation of the Purdy Plan was delayed at the request of defendants for 90 days to permit adequate time for necessary administrative arrangements. State Attorney Gerstein's subsequent request that the court further

[1]Defendant State Attorney Gerstein adopted Sheriff Purdy's plan, while reserving his right to pursue appellate remedies.

delay compliance, pending completion of an appeal, was denied. The Fifth Circuit Court of Appeals granted the requested stay by order of March 31, 1972.

Despite the Fifth Circuit stay, the Dade County judiciary officials moved voluntarily in the hiatus during appeal to establish their own plan for providing preliminary hearings. To effectuate this court's implementation order, a Committing Magistrate Rules Committee was formed by administrative order of Chief Judge Marshall C. Wiseheart of the Eleventh Judicial Circuit of Florida on March 13, 1972. After the stay had been issued, however, the work of the committee independently bore fruit as an administrative [5] order of the Chief Judge created a committing magistrate system on April 15, 1972, which provided a limited right to a preliminary hearing. Although the requirements of the Dade County Magistrate System did not entirely conform with those of this court's order or those of the Purdy Plan, the differences are now moot in view of subsequent developments.[2] In retrospect, it is only unfortunate that in spite of our efforts to secure alternative proposals, the court did not have the opportunity to consider the plan actually implemented.

The signal development, however, came with the issuance of Amended Rules of Criminal Procedure by the Florida Supreme Court on December 6, 1972. The Amended Rules, which took effect February 1, 1973, contain many of the safeguards contained in this court's plan of January 25, 1972, including provision for preliminary hearings

[2]It should be noted; although defendant State Attorney Gerstein acquiesced in the committing magistrate system, he reserved the right to continue to file direct informations with the Clerk of the Criminal Court of Record.

under a committing magistrate system. The State Supreme Court has once again demonstrated that it is not blind to the continued violation of 40-year old state statutes requiring an arresting officer to take the defendant before a committing magistrate without unnecessary delay. Fla. Stat. § § 901.06 901.23 (1971) (originally enacted as Law of June 12, 1939, ch. 19554, §§ 6, 23, [1939] Fla. Laws 1300); see e.g. State ex rel. Carty v. Purdy, 240 So.2d 480 (Fla. 1970); Milton v. Cochran, 147 So.2d 137 (Fla. 1962).

Upon hearing oral argument on October 18, 1972, in the appeal, the Fifth Circuit entered an order of October 24, [6] vacating its stay of our January 25, 1972 order, directing this court to make specific findings on the constitutional deficiencies of present practice, and authorizing the implementation of the Purdy Plan.[3] In accordance with that mandate, a hearing was set for November 16, 1972, but delayed at the request of defendants until January 18,

[3]The Fifth Circuit order stated:
"[I]t is now
"ORDERED that the stay order heretofore entered is hereby VACATED.
"It having been made to appear on oral argument that with substantial acquiescence of the Attorney General of the State of Florida, measures have now been instituted to afford some of the relief relating to hearings to determine probable cause for arrest of members of the class represented by named plaintiffs, the trial court is directed to compare in detail the plan incorporated in its order with the present practice, and make specific findings in which it determines to what extent the present practice falls short of meeting constitutional requirements. A copy of its findings shall be furnished to counsel and to this court.
"Pending the completion of such inquiry, the trial court may put into effect such parts of its plan as are consistent with the proposed plan submitted to the court by Sheriff Purdy."

1973. On the basis of the presentations of the parties and amicus curiae Dade County Bar Association at that hearing, the following findings of fact and conclusions of law are hereby entered.

The parties agreed and stipulated to the premise, in which the court concurs, that the mandated assessment of present practices must concern itself with state procedures after February 1, 1973, under the Florida Rules of Criminal Procedure as now amended. The parties further agreed and stipulated that, so viewed, only four aspects of present [7] practice differ from the court's plan of January 25, 1972, and remain to pose issues of constitutional dimension in this case.

II

THE PRESENT PRACTICE WHICH PERMITS THE STATE ATTORNEY TO FILE AN INFORMATION AND OBVIATE THE REQUIREMENTS OF A DETERMINATION OF PROBABLE CAUSE BY A NEUTRAL AND DETACHED MAGISTRATE DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Rule 3.131(a) of the Florida Rules of Criminal Procedures states:

> "A defendant, unless charged on an information or indictment has the right to a preliminary hearing on any felony charge against him.

The Rule is consistent with the longstanding law of Florida. State ex rel. Hardy v. Blount, 261 S.2d 172 (Fla. 1972).

The validity of this practice, which permits the State Attorney to be the sole arbiter of probable cause, has always been the main issue in this case.

Not only does the present practice permit the State Attorney to block a preliminary hearing, it also allows him to overrule a determination of no probable cause made by a magistrate by refiling an information. Therefore the whole preliminary hearing system is really conditioned upon the desires of the State Attorney. If he files an information prior to the preliminary hearing, none will take place. If he files an information after a magistrates detached and impartial determination of no probable cause, the accused may remain in jail until trial.

This practice cannot be reconciled with the constitutional requirement of the due process clause of the fourteenth amendment and the fourth amendment. The continuation of the practice is in clear conflict with the plan previously entered by the court and with the original decision of the court.

[8] In addition to the cases relied upon in that decision (at 336 F.Supp. 1107 et. seq.), recent Supreme Court decisions confirm that the deprivation of liberty caused by the prosecuting attorney without any judicial review is unconstitutional. See: Morrissey v. Brewer, ____ U.S. ____ 92 S.Ct. 2503 (June 29, 1972;) Fuentes v. Shevin, 92 U.S. 1983 (June 12, 1972); Stanley v. Illinois, ____ U.S.____, 2 S.Ct. 1208 (April 3, 1972); Shadwick v.

City of Tampa, ____ U.S. ____, 92 S.Ct. 2119 (June 19 1972), and United States v. United States District Court, ____ U.S. ____, 92 S.Ct. 2125 (June 19, 1972).

III

THE PRESENT PRACTICE WHICH EXCLUDES MISDEMEANANTS FROM A PRELIMINARY HEARING DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Rule 3.13(a) of the Florida Rules of Criminal Procedure, as amended, authorizes hearings before a neutral and detached judicial officer only "on any felony charge." Thus, misdemeanants need not be afforded a preliminary hearing under the present practice, despite the fact that the preliminary hearing provisions of the amended rules provide the only guarantee of prompt determinations of probable cause. Consequently, the accused misdemeanant remains unprotected by present practices against deprivation of his liberty. As the court's original opinion made clear, this deprivation of liberty is particularly unjustifiable as a denial of due process for those misdemeanants who remain in custody without bond. Pugh v. Rainwater, 332 F.Supp. 1107 (S.D.Fla.1971); cf. Morrissey v. Brewer, ____ U.S.____, 92 S.Ct. 2593 (1972). The Court's plan to effectuate its original order, as well as the proposal of Sheriff Purdy, therefore made no distinction between felony cases and mis [9] demeanors.

However, it is well-settled that "once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 92 S.Ct. 2593, 2600 (1972). and that the process due depends on the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurther J., concurring), quoted in Goldberg v. Kelley, 397 U.S. 254, 263 (1970).

Although we think it clear that the deprivation to misdemeanants held in custody unable to meet their bond requires a prompt neutral probable cause determination, the question becomes more difficult as applied to misdemeanants out on bond and those who are charged with violating county ordinances which carry no penalty of imprisonment. We have therefore taken our cue from the Supreme Court in Argersinger v. Hamlin, 92 S.Ct. 2006 (1972) and concluded that a neutral determination of probable cause is required by the fourth amendment for all misdemeanants who face potential imprisonment.

However, we are unable to conclude that either due process or the fourth amendment requires a probable cause determination by a judicial officer for those misdemeanants accused of violations which carry no possible imprisonment. See Shadwick v. City of Tampa. We think that misdemeanants within this category can properly be screened by a State Attorney for the very reason that his office is not fundamentally concerned with the prosecutions of the barking dog variety, but screens them as a general rule at the request of complaining citizens.

Thus, the State Attorney may not constitutionally obviate preliminary hearings where a potential term of con[10]finement faces the misdemeanant.

The present practice, as embodied in the amended rule, suffers from an additional shortcoming. It creates a classification, based solely on the type of offense, which deprives accused misdemeanants, but not accused felons, of a right long recognized as "fundamental": the right not to be deprived of liberty without due process of law and consistent with the fourth amendment. Thus, although classification of crimes is ordinarily a matter left largely to the states, this categorization touches upon a right "that the court has come to regard as fundamental and that demand[s] the lofty requirement of a compelling governmental interest" to justify it. In re Kras, 41 U.S.L.W. 4117, 4121 (January 10, 1973), citing Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

Two such state interests were advanced by defendants with the voluntary cooperation and testimony of the Hon. John A. Tanksley, Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit, as sufficiently compelling to justify the classification. First, the state's interest in assuring misdemeanants a fair and impartial trial. Judge Tanksley testified that Justice Adkins of the Florida Supreme Court wished to inform the court that although the advisory committee which formulated the amended rules had recommended that preliminary hearings be afforded misdemeanants, the Florida Supreme Court had demurred from so providing because of its concern that the same magistrate who determined probable cause in a misdemeanor case might end up trying that very case thereby denying the defendant a fair and

impartial trial. Although the state's interest in providing fair and impartial fact-finders is doubtless both a laudable and compelling one, Judge Tanksley went on to testify that preliminary hearings and misdemeanor trials are conducted by [11] separate panels of judges under the present practice in Dade County. While he could not speak for practice in the remainder of the state, we are not in this suit faced with practices outside Dade County.

The second compelling interest suggested by defendants was that of expense to the state to provide preliminary hearings for misdemeanants Judge Tanksley testified that if the five Dade County Judges assigned as magistrates were to provide preliminary hearings for misdemeanors as well as felonies their caseload might increase by as much as 30 to 35,000 cases a year, or approximately 3,000 a month. He acknowledged, however, that these projections represented an upper limit, and that figure might be considerably reduced in practice due to waivers of preliminary hearings and guilty pleas. He also acknowledged that a large part of the misdemeanor caseload consists of county penal violations, formerly heard by justices of the peace, which are now classified as misdemeanors as a result of the state court reorganization act. He characterized these as the "barking dog" and "loud parties" cases. Since these cases, which do not involve potential imprisonment, are not affected by the court's order, we conclude that the increase in the magistrate's caseload from providing preliminary hearings to misdemeanants who face potential imprisonment will fall considerably short of Judge Tanksley's projection and, if substantial, will not be overly burdensome. The court, concludes, however, that while more magistrates as well as courtroom facilities may be needed as a result of our

order, and that costs may increase in the short run, it will not be a significant increase.

Judge Tanksley also testified, however, that despite dark predictions to the contrary by defendants at the time of this court's initial order, the magistrate's system has been [12] highly successful in felony cases. He estimated that, as a result of the magistrate system, felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County. We are pleased to learn that there is now evidence to support our prediction that

> "[t]he expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community." 332 F.Supp. at 1114.

Although we acknowledge that a state has a proper interest in maintaining its fiscal integrity and may legitimately attempt to limit its expenditures, it is well settled that a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. Shaprio v. Thompson, 394 U.S. 618, 633 (1969). In the case before us, defendants must do more than show that denying due process to misdemeanants will save money. In the absence of other suggestions of compelling interests, we must conclude that present practice deprives misdemeanants of equal protection of the law, in addition to due process and fourth amendment guarantees.

IV

THE PRESENT PRACTICES WHICH PROVIDE DIFFERENT TIMES FOR PRELIMINARY HEARINGS FOR THOSE CHARGED WITH CAPITAL OFFENSES OR OFFENSES PUNISHABLE BY LIFE IMPRISONMENT DIFFER FROM THE COURTS PLAN AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THE FOURTH AMENDMENT.

Rule 3.131(b) of the Florida Rules of Criminal Procedure provide:

> "In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 72 hours of the time of the defendant's first appearance. In all capital offenses and offenses punishable by life imprisonment and in all cases where the defendant is not in custody the preliminary hearing shall be held within seven days of the time of defendant's first appearance." (emphasis added).

[13] The present practice, as set forth in that rule, differs from the court's plan and Sheriff Purdy's plan only insofar as it excludes the two enumerated categories of offenses from the established time frame of four days.[4]

[4]The court plan had required initial appearance within three hours of arrest and preliminary hearing within four days thereafter. The new Florida Rules require initial appearance within 24 hours and preliminary hearing 72 hours (3 days) thereafter. Thus the crucial time of preliminary hearing is hastened by three hours under the Florida Rules, except for the persons falling into the classification set forth above.

By creating a separate classification for persons accused of capital offenses or offenses punishable by life imprisonment, the practice suffers an equal protection infirmity similar to that caused by the total exclusion of misdemeanants from a preliminary hearing. The court finds no compelling governmental interest which justifies the classification. cf. In re Kras, supra, and Shaprio v. Thompson, supra.

By failing to set the same time requirements for capital and life imprisonment cases as compared to other felonies, their present practice condones an extended deprivation of liberty without a hearing.

The timeliness of the preliminary hearing has been a constant concern of this court. The court recognizes that tolerating a deprivation of liberty for four days, absent a judicial determination of probable cause, is questionable. In Argersinger v. Hamlin, 407 U.S. 25 (1972) the court prohibited a denial of liberty for one day absent counsel. Here we are condoning a denial of liberty for four days absent a [14] hearing. Property rights have consistently been protected by a hearing prior to the taking. Fuentes v. Shevin, 407 U.S. 67 (1972).

Thus, while four days may be a reasonable time to allow witnesses to be summoned and other mechanical tasks performed, an eight day (24 hours for initial appearance plus seven days) deprivation of liberty is not reasonable. For the reasons set forth in the original Pugh

v. Rainwater decision and upon the recent decisions of the Supreme Court cited infra. The court finds that the present practice of not setting the same time requirement for all persons who will be proceeded against by information violates the fourth and fourteenth amendments.

V

THE FAILURE OF THE PRESENT PRACTICE TO PROVIDE SANCTIONS FOR FAILURE TO CONDUCT THE PRELIMINARY HEARING AND THE REFILING OF AN INFORMATION IF A DEFENDANT IS DISCHARGED DIFFERS FROM THE COURT PLAN AND RESULTS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

The present practices provide no sanction for the failure to accord a preliminary hearing or for the refiling of an information after determination of no probable cause. They do not, because Florida law tolerates the use of the information process in lieu of a probable cause determination by a neutral and detached magistrate. Rule 3.131(a), Florida Rules of Criminal Procedure. The court plan did contain sanctions. If a preliminary hearing was not accorded within the time period set and there was not a waiver or proper postponement, then the defendant was to be discharged and the charges withdrawn. However they could be refiled, but if the preliminary hearing was not accorded thereafter, then the defendant was to be discharged and not held again to answer except upon an indictment returned within 30 days of the second withdrawal. Pugh v. Rainwater, 336 F.Supp. at 493. [15] If a magistrate made a determination of no probable

cause and discharged the defendant, the defendant could not be recharged except upon a grand jury indictment returned within thirty days of the discharge. Pugh v. Rainwater, 336 F.Supp. at 492.

The Court of Appeals requested this court to make specific findings to determine the extent to which the present practice is constitutionally invalid. The failure to provide sanctions is not, of itself, an unconstitutional infirmity. It is the failure to accord probable cause hearings, which offends the Constitution. Thus, the lack of sanctions is invalid only insofar as the failure to provide sanctions results in a system which tolerates the denial of, or overruling of, a preliminary hearing. This is a corollary of the very first finding made above.

The courts, for far too long, have been blind to what all others see. We have operated under a conceptualism which no longer corresponds to the reality in many parts of the nation as increasingly crowded criminal dockets. [sic] The hard fact is that in many of our overburdened judicial systems state as well as federal, it may be a matter of weeks before even direct informations are filed, as was the situation in Dade County when this suit was brought, and a matter of months before the accused is brought to trial. In the interim, those unable to post bail suffer what can only be understood as a grave deprivation of liberty, however it may be theoretically justified.

Therefore the court finds that the failure of the present practice to provide a remedy for the denial of a preliminary hearing or the overruling of a preliminary hearing by use of the information process, insofar as that failure tolerates and condones such denials or overrulings,

[16] results in a violation of the fourth and fourteenth amendments. See the cases cited in Pugh v. Rainwater, 332 F.Supp. 1107 (S.D.Fla. 1971) and the more recent cases of Morrissey v. Brewer, Fuentes v. Shevin, Stanley v. Illinois, Shadwick v. City of Tampa, and United States v. United States District Court, supra, which fully support the proposition that the taking of a person's liberty absent a hearing by a neutral and detached magistrate, is unconstitutional.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 16 day of February, 1973.

/s/ James Lawrence King

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

June 1, 1973

TO ALL COUNSEL OF RECORD

No. 72-1585 — Pugh v. Rainwater

Gentlemen:

The Court has directed that this letter be sent.

A hurried reading of Judge King's memorandum order and opinion of February 16, 1973 (filed with this

Court on March 12, 1973) indicates to the Court that he has, in response to our previous order of October 24, 1972, and in accordance with a stipulation by the parties as to the effect of the promulgation of the new Florida Rules of Criminal Procedure on the pending appeal in the Fifth Circuit, undertaken to rule specifically on four aspects of the new rules:

(i) that insofar as Rule 3.131(a) still authorizes the incarceration of a person against whom an information has been filed without a probable cause hearing by a detached magistrate, it violates due process;

(ii) that the failure of the Rules to provide a probable cause hearing for misdemeanants denies that class of people both due process and equal protection;

(iii) that the allowance of different periods of delay prior to the probable cause hearing for those accused of felonies for which a life sentence could be imposed (7 days) than for those for whom a shorter limited period of imprisonment would be the maximum (3 days) denies those subject to the longer period of delay due process and equal protection; and

(iv) that insofar as the failure of the Florida Rules to provide explicit remedies for failure to comply with the requirements imposed by the holding as to (i) above sanctions or encourages the incarceration of defendants without a probable cause hearing it results in a violation of the Fourth and Fourteenth Amendments.

In order that the Court may have a full and proper understanding of the issues which it must now resolve in light of the changed factual circumstances in the Florida practice, the stipulation by the parties as to the effect of these changes on this case, and the subsequent opinion of Judge King of February 16, 1973, the Court directs counsel to file within 7 days from the receipt of this communication typewritten memoranda addressing themselves to the following issues as well as any not specified but which in counsel's opinion are related and significant.

First, to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490? [sic] Specifically, assuming that the declaratory provisions of Judge King's supplemental order of February 16, 1973, are sustained by this Court on appeal, to what extent are the very specific provisions of his prior decree either necessary or desireable? In this regard counsel should include with their memoranda a proposed order and decree which this Court could direct the District Court to enter dealing specifically with their contentions. This should be constructed so that each of the principal issues outlined are separately stated to permit ready adaptation depending on which, if any, of the holdings are sustained. Since this is so requested on the hypothesis that each is sustained, the Court is hopeful that all counsel could join in a proposed decree or at least indicate differences specifically. With the proposed decree(s) with explanatory memoranda the Court will be able to determine the extent to which the decree to be mandatad should or must contain definitive details as to mechanics, sanctions, and the like.

Second, our hurried consideration of the supplemental order raises some concern that there are no parties before the Court with standing to raise the equal protection issues treated in parts (ii) and (iii), supra, of Judge King's supplemental order. Are there any accused misdemeanants threatened with loss of liberty by the operation of the new Florida Rules before the Court? Are there any parties to this litigation who are accused of felonies which could result in a life sentence and who are substantially affected by the operation of the new Florida Rules so as to have standing to assert the claim that the longer period of delay violates equal protection?

Third, and in a more general sense, to what extent does the supplemental opinion and the stipulation of counsel alter, reduce or eliminate one or more or all of the objections or attacks made on the District Court's initial opinion and detailed decree which were the subject of this appeal as submitted on oral argument? In summary, just what if anything is left of this appeal?

The Court appreciates the continued cooperation of counsel. The memoranda are to be filed in clear typewritten copies, one to the Clerk, one copy to each of the Judges at his home station. These may be filed simultaneously with the privilege of replies, rejoinders, etc., as thought helpful.

Very truly yours,

/s/ Edward W. Wadsworth,

EDWARD W. WADSWORTH,
Clerk

cc: Honorable John R. Brown, Chief Judge
U.S. Court of Appeals
11501 U.S. Courthouse, 515 Rusk Ave.
Houston, Texas, 77002

Honorable Elbert P. Tuttle
U.S. Senior Circuit Judge
P.O. Box 893
Atlanta, Georgia 30301

Honorable Joe Ingraham
U.S. Circuit Judge
11004 U.S. Courthouse, 515 Rusk Ave.
Houston, Texas 77002

JOINT MEMORANDUM IN RESPONSE TO COURT'S LETTER OF JUNE 1, 1973

(Filed June 8, 1973)

Pursuant to the Court's letter of June 1, 1973, counsel for the plaintiffs, the amicus curiae and the State Attorney conferred and jointly submit this response to the Court.[1]

The Court asked this question: "In summary, just what if anything is left of this appeal?" The parties and amicus curiae all agree that the major substantive legal issue remains intact. That issue is,

> DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?

The State Attorney's unequivocal position is, and has always been, that an information filed by him or one of his assistants is sufficient to determine probable cause

[1]Mr. Barry Richard, Assistant Attorney General, was unavailable for consultation. However Mr. Richard's concern in this case has been with the bail issue posed in the companion matter, No. 72-1223. Mr. Mellon, from the State Attorney's office has been solely responsible for the preliminary hearing issues which were the subject of the Court's letter. Mr. Mellon is a signatory to this memorandum.

and that the filing of an information obviates any right to a preliminary hearing before a judicial officer. That position is consistent with present and past Florida law. It is that issue which has been at the heart of this suit since its inception. If the Court inferred from Judge King's February 16, 1973, order that that controversy was stipulated away, it was mistaken. The plaintiffs and the amicus curiae agree that the issue posed is alive, and a continuing dispute.

• • • •

The Court asked: "... to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490?" and "... to what extent are the very specific provisions of his prior decree either necessary or desireable?"

The order at 336 F.Supp. 490 sets forth the procedures for implementing the substantive decision reported at 332 F.Supp. 1107. Given the plan instituted by the County and the new Florida Rules of Criminal Procedure, the parties agree (except as to two points set forth below) that the February 16, 1973, order does, in effect, supersede the mechanical plan. In other words, except in the two areas designated below, if the declaratory provisions of Judge King's February 16 order are sustained, there is no longer any need for this Court to issue an order detailing how a committing magistrate system must work.

The parties also agree that the February 16, 1973, order restates and amplifies the original order at 332 F.Supp. 1107.

• • • •

The two areas referred to above are these: (1) the time between arrest and preliminary hearing and (2) the sanctions.

(1) Judge King's order held: "If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days [of initial appearance]." 336 F.Supp. at 492. In his February 16 order Judge King noted that the new Florida Rules mandate preliminary hearing within 72 hours, or 3 days of initial appearance.[2] That appearance is required within 24 hours of arrest.[3] Thus the total time lapse between arrest and preliminary hearing appeared to Judge King to be 4 days, which would have been consistent with his previous order.

However, Rule 3.040 of the Florida Rules of Criminal Procedure states:

> "When the period of time prescribed or allowed shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Thus a six day lapse is tolerated. The plaintiffs and the amicus curiae believe that a four day lapse between arrest and determination of probable cause is the constitutionally tolerable maximum. Since due process usually requires a hearing prior to the taking of property or liberty, it is argued that a subsequent hearing must occur within the shortest possible time.

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[2]Rule 3.131(b), Florida Rules of Criminal Procedure.

[3]Rule 3.130(b)(1), Florida Rules of Criminal Procedure.

The State Attorney believes, inter alia,[4] that clerical or logistical needs, and laboratory analysis time in narcotics cases, necessitate the current time frame. Plaintiffs rejoinder is that more personnel should be hired.

• • • •

(2) The State Attorney does not agree with plaintiffs and amicus curiae regarding sanctions. The State Attorney's position is set forth in his supplemental letter.

The relevant sanction provisions of Judge King's original order were:

> "17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge."
> 336 F.Supp. at 492.

> "19..... (2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to

[4]The State Attorney s filing a supplemental letter to elaborate on his position regarding thispoint and the sanction issue.

> that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal."
> 336 F.Supp. at 493.

Plaintiffs and amicus curiae agree that if the Court finds for the plaintiffs the sanctions set forth above are appropriate.

• • • •

In its letter, the Court asked for proposed orders and decrees with regard to the specific enforcement provisions. Since this memorandum has hopefully made it clear that only two areas need be addressed in that regard, undersigned counsel for plaintiffs and amicus curiae respectfully take the liberty of making those proposals within this memorandum.

As to sanctions, the plaintiffs and amicus curiae urge that the District Court be directed to enter a fresh order imposing the sanctions quoted above after discharge by a magistrate and for failure to provide preliminary hearings.

As to the appropriate time for preliminary hearings, plaintiffs and amicus curiae submit that this Court should, after it makes it substantive Fourth and Fourteenth Amendment conclusion, order:

> "That persons arrested an incarcerated shall be given a judicial hearing to determine probable

cause within four (4) days from the time of their arrest.[5]

The State Attorney objects to the four day period for the reasons mentioned above and those set forth in the supplemental letter to be filed by the State Attorney.

* * * *

The Court asked if the plaintiffs have standing to raise the equal protection issues relating to misdemeanants and felons charged with offenses carrying life sentences. All parties agree that plaintiffs have standing. Plaintiff Robert Pugh was charged with robbery (App. p.2) a crime which was, and is punishable by life imprisonment. Plaintiff Nathaniel Henderson was charged with assault and battery (App. p.19) which was, and is, a misdemeanor under Florida law. Both the original and intervening complaints were brought as class actions on behalf of all persons arrested by law enforcement officers in Dade County who are detained solely upon a direct information (App. 3, 40) and the Court below found that method of litigation to be appropriate. 332 F.Supp. 1107 at 1115.

* * * *

The undersigned counsel for the name parties respectfully submit this memorandum.

[5]For those persons not in custody, Florida Rule of Criminal Procedure 3.131(b) provides that the preliminary hearing be held within seven days of first appearance. Plaintiffs and amicus curiae have no objection to that time period.

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/s/ Leonard R. Mellon

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The opinion and judgment of the Fifth Circuit Court of Appeals is included in the printed Petition for Certiorari and appears there on pages 1-28.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 72-1585

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf of all
others similarly situated,
Plaintiffs-Appellees,

THOMAS TURNER and GARY FAULK,
on their own behalf and on behalf of all
others similarly situated,
Plaintiffs-Intervenors,

versus

JAMES RAINWATER, MORTON S. PERRY,
SIDNEY SEGALL, Judges, Etc., ET AL,
Defendants-Appellants.

[Filed September 18, 1973]

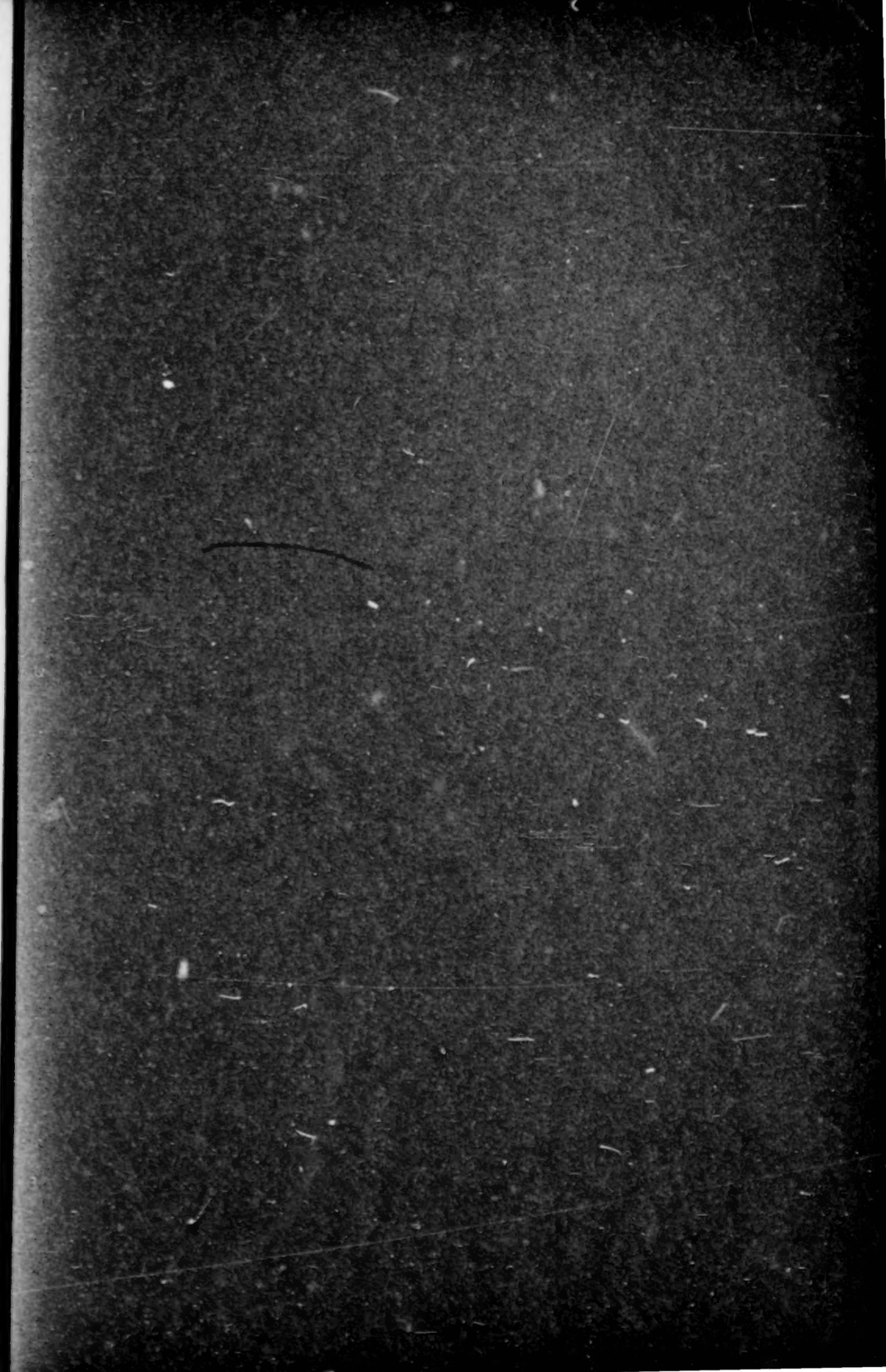
ON CONSIDERATION OF THE APPLICATION of the Appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari

petition has been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

/s/ [signature illegible]

UNITED STATES
CIRCUIT JUDGE

Dated:



In the Supreme Court of the United States

OCTOBER TERM 1972

No. -

RICHARD E. GERSTEIN,
State Attorney for the Eleventh
Judicial Circuit of Florida, in and for Dade County,
Petitioner,

VS.

ROBERT PUGH and NATHANIEL HENDERSON,
on their own behalf and on behalf of all
other similarly situated,
Respondents.

Response to Petition for Writ of Certiorari

ROBERT PUGH and NATHANIEL HENDERSON respond to the Petition for Writ of Certiorari filed by Petitioner, RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida.

The Respondents would state the initial question presented by the Petitioner in a different manner.

DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY[1]

Petitioner GERSTEIN asserts that the decision below, which answered the preceding question affirmatively, was erroneous. He contends that the decisions in *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom V. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914) and *Beck v. Washington*, 369 U.S. 541 (1962) compelled a negative answer. The respondents submit that the decision below correctly analyzed those cases and found them to be inapplicable. Moreover, the recent decision of this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1970); *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Shadwick v. City of Tampa*, 407 U.S. 345 (1971) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) make it clear that the decision below was not erroneous.

However, respondents cannot dispute that the decision below presents an important question of federal constitutional law and that it conflicts with Florida law.

The due process and Fourth Amendment issues presented by the opinion below have never been determined by this Court. They are important issues because they are concerned with the deprivation of liberty prior to trial.

The conflict with Florida law presents the possibility of ongoing tension between the Florida and Federal courts unless the issue is resolved by this Court. Separate federal actions may now be brought against each of the state attorneys in Florida, seeking to compel compliance with the Court of Appeals decision below. Other states may be similarly affected.

The conflict which petitioner sees between the decision below and other Courts of Appeal decisions does not exist. (See Gerstein Petition, pp. 12-13). None of the Courts of Appeal cases cited confronted the precise question which the Fifth Circuit decided in this case.

* * * *

There are no reasons which would justify the exercise of certiorari on the comity question presented by Petitioner. The Petitioner has advanced none. He has written:

> *Due process does not compel the granting of a preliminary hearing. There was, accordingly, no basis for the District Court's interference in the criminal justice system in Dade County, Florida. (Gerstein Petition, p. 14).*

Thus, his comity argument is tied to his substantive argument. He concedes that if the Court below was correct in requiring preliminary hearings, it could act.[2] Therefore, only the due process and Fourth Amendment issues present questions for review.

CONCLUSION

Because the decision below does present an important constitutional question never decided by this Court, and because the decision below does conflict with the decisions and the Rules of the Florida Supreme Court, the respondents do not oppose certiorari.

Respectfully submitted,

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---

[1]In a cross-petition filed simultaneously with this response, PUGH and HENDERSON seek certiorari because the court below did not order probable cause hearings *immediately* after arrest.

[2]In any event the Fifth Circuit was clearly correct in holding that *Younger v. Harris*, 401 U.S. 37 (1970) was no bar. If *Younger* were applicable, this case would be an exception because of the presence of great and immediate irreparable injury (the loss of liberty) which could not be remedied by *any* action in Florida courts because of the consistent and adamant Florida position that an information obviated any right to a judicial determination of probable cause.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and
THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and subsequent order of the district court are reported in 332 F. Supp. 1107 (S.D. Fla. 1971) and 336 F. Supp. 490 (S.D. Fla. 1972), and reprinted at pages 70-96 of the Appendix. The opinion of the court of appeals is reported at 483 F.2d 778 and is set forth at pages 1 et seq in the appendix to the Petition for Certiorari.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I

WHETHER A PERSON IN STATE CUSTODY HAS A CONSTITUTIONALLY PROTECTED RIGHT TO A PRELIMINARY HEARING.

II

WHETHER A UNITED STATES DISTRICT COURT JUDGE HAS JURISDICTION TO INTERFERE BY DECLARATORY AND INJUNCTIVE ACTION WITH DULY CONSTITUTED STATE CRIMINAL PROCEEDINGS ON THE QUESTION OF PRELIMINARY HEARINGS.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.

2. Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

(The parties will be referred to in this Brief as they stood in the district court.)

Plaintiffs Pugh and Henderson, on March 22, 1971 (A. 2 et seq) joined subsequently on April 12, 1971 (A. 82 et seq) by Plaintiffs Turner and Faulk, filed a class action in the United States District Court For The Southern District of Florida, seeking an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The Plaintiffs asked the Court to compel the Defendant—State Attorney Gerstein, among other defendants, to grant such a hearing to Plaintiffs and members of their class and to declare that they were so entitled to such a hearing (A. 11).

On April 6, 1971, Defendant Gerstein filed his Answer and a Motion for Summary Judgment (A. 17 et seq). In his Memorandum of Law in support of the Motion for Summary Judgment, the Defendant Gerstein admitted as undisputed facts the following:

> 1. The Plaintiffs were charged at said time with violations of the Florida Statutes.
>
> 2. They had been charged by Information as permitted by Article I, Section 15 (a) of the Florida Constitution.
>
> 3. That prior to the filing of the Information, there was no preliminary hearing.
>
> 4. That the Informations were filed by the Defendant Gerstein or by one of his duly appointed Assistant State Attorneys, under and by his authority.
>
> 5. It is the policy and practice of the Defendant, Gerstein, his agents, servants and employees, to file Informations based on an independent examination of the facts, notwithstanding that there has been no preliminary hearing.
>
> 6. It is the policy and practice of the Defendant, Gerstein, his agents, servants and employees, to resist any attempt to have preliminary hearings after an Information has been filed or an Indictment has been found (A. 22).

In an "Order and Final Judgment" filed October 12, 1971 the district court phrased the issue then before the court as follows:

> "The principal constitutional issue for determination is of course whether one who is arrested and held for trial upon an Information filed by the State Attorney is entitled to a hearing before a judicial officer, on the question of probable cause (A. 77).
>
> To which issue the Court answered:
>
> "The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause." (A. 85).

Those arrested under indictment are not included in the order (A. 73-74).

The Court accordingly granted the sought after relief to the Plaintiffs and further directed:

> "That defendants shall, within 60 days of the date hereof, submit to the Court a plan providing for a preliminary hearing before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct Information. The preliminary hearing shall be within a reasonable time of the arrest." (A. 87).

On January 25, 1972, the District Courts' Order Adopting Plan to Provide Preliminary Hearings was filed (A. 88 et seq). In it, the Court required that all persons arrested with or without warrants in Dade County, Florida, be brought before a committing magistrate for a first appearance hearing within three hours of the time the defendant is taken into custody. At the first appearance hearing, the magistrate was required to advise the defendant of the charges against him and of his rights under the Constitutions of the United States and of Florida, and was to appoint Counsel should the defendant be indigent. He was also required to set a date and time for a preliminary hearing to determine whether there was probable cause that the defendant "committed the offense with which he is charged."

Under the Plan, all persons subject to booking had to be booked at the Metropolitan Dade County Jail. Committing magistrates were to be available for first appearance hearings on a twenty-four hour, seven day a week basis. If a magistrate discharged a defendant after finding no probable cause that an offense was committed by the defendant, the defendant could not be held to answer to a subsequent charge for the same offense by Information filed by the State Attorney. The defendant could only be so charged upon an Indictment by the Grand Jury returned within thirty days of the defendant's discharge. If a defendant was not given a preliminary hearing in the time provided in the Order of the Court, and the hearing was not properly postponed or waived, all charges against the defendant were to be withdrawn and the defendant, if incarcerated, immediately released, with the State not permitted to refile a charge unless the defendant was indicted by the Grand Jury within thirty days of the

second withdrawal. Under the Order, the Plan was to be put into effect within ninety days from January 25, 1972 (A. 96).

It was from the "Order and Final Judgment" of October 12, 1971, and the January 25, 1972 Order Adopting Plan to Provide Preliminary Hearings that the appeal to the Court of Appeals was taken.

The Plan was stayed by the court of appeals pending appeal. During this time the judiciary of Dade County and other parties involved in the county's criminal justice system implemented a separate plan providing for preliminary hearings (A. 98).

Subsequent to oral argument in the court of appeals, that court directed the district court to make specific findings of fact on the constitutional deficiencies, if any, as between the district courts' Plan and the plan then in effect in Dade County (A. 98).

The district court, after oral argument, made its findings taking into consideration the Amended Rules of Criminal Procedure promulgated by the Florida Supreme Court on December 6, 1972, which became effective February 1, 1973. These rules provide for a committing magistrate system but continue Floridas' long standing practice of permitting a state attorney to file a direct Information without providing a defendant a subsequent probable cause hearing by a magistrate (A. 104).

The rules make no provision for preliminary hearings for misdemeanants (A. 105)—They also provide different preliminary hearing times for those in custody charged

with capital offenses or offenses punishable by life imprisonment as compared to other incarcerated defendants charged with lesser felonies (A. 110).

The district court found, inter alia, that the practice of permitting direct filings of Informations by the state attorney without a subsequent probable cause hearing differed from its plan and was violative of the Fourth Amendment and the Due Process clause of the Fourteenth Amendment (A. 103).

The district court also found that not granting preliminary hearings to misdemeanants differed from its plan and therefore suffered from the same constitutional infirmity mentioned above (A. 105).

The district court also found that the practice of providing different preliminary hearing times to those charged with capital offenses or offenses punishable by life imprisonment differed from its plan and was violative of the due process and equal protection clauses of the Fourteenth Amendment and the Fourth Amendment (A. 110).

Subsequently, in a letter to all counsel of record, dated June 1, 1973, the court of appeals, inter alia, asked, "In summary just what if anything is left of this appeal?" (A. 117).

In its joint memorandum of response, counsel stated that the major abiding substantive legal issue which remained intact was:

"DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?" (A. 119)

In its order and decision of August 15, 1973 upholding the district court, the Court of Appeals held that reasons of comity did not bar the suit of plaintiffs and that, therefore, the court "need not decide whether this situation comprises an exception to Younger." [vs. Harris, 401 U.S. 37] (Pet. A. 7)

The court thereupon held that the Fourth and Fourteenth Amendments require that arrestees held for trial on informations filed directly by the state attorney must without unreasonable delay, be given a preliminary hearing before a judicial officer (Pet. A. 9-10, 21). The court also found constitutionally violative the disparity in time for preliminary hearings for those persons charged with capital crimes and those charged with offenses having life terms as possible punishment (Pet. A. 25, 26).

The court of appeals also held that misdemeanants were also entitled to preliminary hearings except where they are out on bond or charged with violating ordinances carrying no possibility of pre-trial incarceration (Pet. A. 25).

On September 18, 1973 the court of appeals filed its order granting the motion of defendant-state attorney to stay the issuance of the mandate in this cause. (A. 127).

SUMMARY OF ARGUMENT

Preliminary probable cause hearings for defendants in state custody whether charged with felonies or misdemeanors are not required by the United States Constitution. This has been the position taken by this Court repeatedly.

It is proper for the Florida Supreme Court in promulgating its Rules of Criminal Procedure governing preliminary hearings to exclude from the hearing requirement those defendants charged by indictment or information. The court of appeals although approving of this practice as it concerns indictments, refused to do so in connection with informations. By so doing it failed to realize that under Florida law there is no probable cause determination by a judge presiding over a grand jury as to criminal charges set out in an indictment. That judge's acts, after an indictment has been returned, are purely ministerial. A state attorney in Florida by law is permitted to determine probable cause and charge by information. The state attorney is in effect a one man grand jury and the court below was in error in not giving equal dignity to informations filed by the state attorney and indictments returned by the grand jury.

The lower court in affirming the district court's interference in a State of Florida criminal prosecution erroneously ignored the comity doctrine espoused by this court. The extraordinary circumstances which must be present before the comity rule can be overcome did not prevail in the case below.

ARGUMENT

I

A PERSON IN STATE CUSTODY DOES NOT HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO A PRELIMINARY HEARING

The court of appeals below has held that the Fourth and Fourteenth Amendment to the United States Constitution require that Dade County, Florida provide preliminary hearings before judicial officers for all defendants in custody awaiting trial on either misdemeanor or felony charges. These hearings are mandated even when those in custody have been charged under informations sworn to by the state attorney. The only defendants exempted under the court's holding are those charged under indictment returned by the grand jury.

Throughout this litigation the defendant-state attorney has argued as dispositive of the Fourth and Fourteenth Amendment questions raised below this Court's decisions in *Hurtado v. California*, 110 U.S. 516 (1884) and *Lem Woon v. Oregon*, 229 U.S. 586 (1913). The court of appeals found them inapplicable holding that they related to the due process question of the necessity for a magistrate's preliminary examination of probable cause *prior* to the filing of an information. (Pet. A. 10-11).

The defendant-state attorney also cited as controlling authority below the cases of *Ocampo v. United States*, 234 U.S. 91 (1914) and *Beck v. Washington*, 369 U.S. 541 (1962). Equally to no avail. The court of appeals ruled that *Ocampo* also was concerned with the narrow question

of prior probable cause hearings. The court of appeals in so doing quotes the following language from *Ocampo*, which, it is submitted, does nothing but hone the thrust of the defendant-state attorney's argument:

Thus it quotes *Ocampo:*

> " 'It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest . . .' "

The concluding portion of the paragraph from *Ocampo* is of signal application here and was omitted in the court of appeals opinion. It is said there (234 U.S. at 100):

> ". . .Such was the nature of the duty of the committing magistrate in the common law practice. . . In short the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial and not such that because of its nature it must necessarily be confided to a strictly judicial officer or tribunal."

Beck, supra was summarily disposed of by the lower court in a footnote as adding "nothing to Ocampo" in that *Beck* deals with "prior probable cause hearings." (Pet. A. 12). In doing so the court ignored completely this statement of law from Beck (369 U.S. at 541):

> "Ever since Hurtado v. California, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some 50 years ago. *Since that time, prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior [which word, in view of Washington law, must be read in the context of "prior" to a trial on the question of guilt or innocence] judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as Ocampo v. United States*, 234 U.S. 91, 51 L.ed. 1231, 34 S.Ct. 712 (1914) and *Lem Woon v. Oregon*, 229 U.S. 586, 57 L.ed. 1340, 33 S.Ct. 783 (1913)." (Emphasis supplied).

Justice Clark in so writing for the *Beck* majority was certainly aware of Washington law which requires neither *prior nor subsequent* judicial determinations of probable cause.

The law of that state is made clear by the case of *State v. Ollison*, (Wash. 1966) 411 P.2d 419. There the defendant after arrest on a warrant had a preliminary hearing for a probable cause determination set on a date certain by a justice of the peace. Prior to that date the prosecuting attorney filed an information in the superior court on the same charges. The defendant was subsequently arraigned, tried and convicted. The defendant on appeal argued that it was error not to grant a preliminary hearing *after* the filing in superior court of the direct in-

formation by the prosecutor. Properly disposing of such contention the Washington Supreme Court said:

> "We see no error in the superior court denial of a preliminary hearing after the information had been filed. A prosecuting attorney in the exercise of his official powers, where he has good cause to believe that a crime has been committed and that he can prove the defendant is guilty thereof, may file an information directly in the superior court without a preliminary hearing. In such a case, the preliminary hearing is not deemed requisite to or an essential element of due process of law." (Emphasis supplied).

The direct filing of criminal informations without prior or subsequent judicial probable cause determinations has long been sanctioned in Florida. Sec. 15 Declaration of Rights to the Florida Constitution; *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); *Bradley v. State*, (Fla. 1972) 265 So.2d 533. It is also the practice, among other states, in Iowa, *State v. Clark*, (1965) 138 N.W.2d 120; Montana, *Petition of Knight*, (1964) 394 P.2d 855; Wyoming, *Orcutt v. State*, (1961) 366 P.2d 690, cert. denied 385 U.S. 874; Arkansas, *Beckwith v. State* (1964) 379 S.W.2d 19; and Connecticut, *State v. Hayes*, (1941) 18 A.2d 895. In the latter case the Connecticut Supreme Court said that state's attorneys have this power because they are invested with the common law power of attorney general. The filing of direct informations had been followed in Connecticut for nearly two centuries prior to 1941, and the practice, had, the court said, been "in vogue" prior to the adoption of the Connecticut constitution. It was further said by the court that "the investigation by the state's

attorney and the determination by him that there is reasonable ground to proceed takes the place of a preliminary hearing by a magistrate and sufficiently fulfills all of the requirements of due process of law." (Citing, inter alia, *Hurtado v. California*, supra.)

The foregoing state authorities recognize the power of state prosecutors to sit, in effect, as a one man grand jury. The district court thus should have given the same weight to a prosecutor's finding of probable cause as it did to a grand jury's. To the contrary it misconstrued Florida law entirely and exempted from judicial probable cause hearings persons charged with crimes by grand jury indictment (the same point was argued to and ignored completely by the court of appeals). The District Court, in so ruling, said that after a grand jury returns an indictment to a judge, that judge reviews it and either issues an arrest warrant "and causes the indictment to be filed or dismisses the charge." The Court then went on to say that this particular procedure provides "for a probable cause hearing, by a judicial officer, prior to trial and . . . (is) not therefore under attack in this litigation."

Under Florida law there is no probable cause determination by a judge as to criminal charges set out in indictments. The judge does not review the indictment and then "cause it to be filed" or dismiss the charge. Under Florida law and practice the judge presiding over a grand jury, once an indictment is handed up has only a ministerial function to perform. Under Rule 3.130 (k) of the Florida Rules of Criminal Procedure: "Upon the filing of either an indictment or information charging the commission of a crime, if the person named therein is not in custody or at large on bail for the offense charged, the

judge shall issue or shall direct the clerk to issue, either immediately, or when so directed by the prosecuting attorney, a capias for the arrest of such person. . . ."

The very nature of the criminal jurisprudential system in Florida makes the District Court's error (ratified by the Court of Appeals) manifest when it speaks of preliminary review of an indictment by a judge. In Florida, once indicted, the next stop in the system for the defendant is not the judge presiding over the grand jury, but the trial court and arraignment and other proceedings therein.

Professor Wright, in 1 Federal Practice and Procedure, 137, Sec. 80, recognizes that it is grand jurors who determine probable cause and not a judge:

> " . . . If the only purpose of the preliminary examination is to determine whether there is good cause for holding the defendant, this is an entirely logical rule. The grand jury has determined the issue of probable cause and there is no need to have a determination by the magistrate. . ."

The Wright view as to indictments is applied in Florida to informations. *Karz v. Overton* (Fla. 1971) 249 So.2d 763; *Maxwell v. Blount* (Fla. 1971) 250 So.2d 657.

A multitude of decisions from the various circuits was cited below for the proposition that due process does not mandate preliminary hearings in cases such as the instant one. These included *Scarborough v. Dutton* (5th Cir. 1968) 393 F.2d 6; *Kerr v. Dutton* (2d Cir. 1968) 393 F.2d 79; *Sciortino v. Zampano* (3d Cir. 1969) 358 F.2d 132; *Rivera*

v. Gov't of the Virgin Islands (4th Cir. 1967) 375 F.2d 988; *Barber v. U.S.* (6th Cir. 1944) 142 F.2d 805; *U.S. v. Luxenberg* (7th Cir. 1967) 374 F.2d 805; *Weber v. Ragen* (8th Cir. 1949) 176 F.2d 579; *U.S. v. Gross* (9th Cir. 1969) 416 F.2d 1205; *Austin v. U.S.* (10th Cir. 1969) 408 F.2d 808 and *Swingle v. U.S.* (D.C. Cir. 1068) 389 F.2d 220. In finding these cases not controlling the lower court sought to distinguish them on the basis that the issue in each of them was the validity of the trial as affected by lack of a preliminary hearing and not the validity of pre-trial detention as such. *Ocampo* and *Beck*, supra, are contrary to this position and should have been controlling authority.

Under present Florida and Dade County practice a great regard is had for the right of persons charged with crimes. Florida's speedy trial rule (Rule 3.191) requires that all persons charged with felonies must be tried within 180 days of arrest. Those charged with misdemeanors must be tried within 90 days. Upon demand defendants must be given a trial within 60 days.

Defendants entitled to preliminary hearings in Florida are given them in a shorter period of time than are defendants charged with crimes against the United States. (See Rule 3.131 (b), Florida Rules of Criminal Procedure).

The Florida practice of denying preliminary hearings to those persons charged under information or indictment accords with federal practice as set forth in 18 U.S.C. 3060 (e) and Rule 5 of the Federal Rules of Criminal Procedure.

There is no basis in the Constitution or in reason to hold the State of Florida and Dade County to a higher standard than that to which this Court has attached its imprimatur.

The Court of Appeals affirmed the district court's imposition of the preliminary hearing requirement in misdemeanor cases holding that "No sufficient justification exists for disallowing preliminary hearings for misdemeanants. The plight of an accused misdemeanant incarcerated without a hearing is just as serious as that of an accused felon. . ." In doing so, the court of appeals again overlooked Rule 5, supra which provides that a defendant charged with a "petty offense" is not entitled to a preliminary hearing. Surely Dade County Florida should not be held to a higher standard than is required by this Court in Federal cases.

From a practical standpoint, as alluded to briefly by the Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit (Dade County) in the testimony mentioned in the court of appeals decision (Pet. A. 24) most misdemeanants in Dade County have disposition of their cases on the merits in a shorter time than they could be accorded a preliminary hearing under the rules now in effect.

II

A UNITED STATES DISTRICT JUDGE HAS NO JURISDICTION TO INTERFERE BY DECLARATORY AND INJUNCTIVE ACTION WITH DULY CONSTITUTED STATE CRIMINAL PROCEEDINGS ON THE QUESTION OF PRELIMINARY HEARINGS

The court of appeals below held that reasons of comity do not bar this suit. Quoting from its earlier decision in *Morgan v. Wofford* (5th Cir. 1972) 472 F.2d 822 the court reiterated that abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1970) "was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred. (Pet. A. 8).

In affirming the declaratory and injunctive relief granted by the District Court, the Court of Appeals has caused the very federal-state court frictions warned about in the concurring opinion in its decision in *Le Flore v. Robinson* (5th Cir. 1971) 446 F.2d 715, 719.

The wisdom of the Congress in establishing (as set forth presently in 28 U.S.C. 2283) what has in effect become a presumption against federal interference with state proceedings in the Act of March 2, 1793, 1 Stat. 335, c22 Sec. 5 is made abundant in the light of the case here under review, with all of its myriad implications.

Cases such as the instant one make manifest the wisdom of Justice Frankfurter's philosophy (the doctrine of abstention) in *Railroad Commission v. Pullman Co.*, 312 U.S. 501 (1941):

> "The federal courts, 'exercising a wise discretion', restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the sound functioning of the federal judiciary."

Due process does not compel the granting of a preliminary hearing. There was, accordingly, no basis for the District Court's interference in the criminal justice system in Dade County, Florida. As this Court said in *Younger v. Harris*, 401 U.S. 37, 42:

> "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism . . .'"

It is submitted that the extraordinary circumstances necessary before the comity rule as heretofore espoused by this Court can be overcome, were not present in the instant case below.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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N. Joseph Durant
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Eleventh Judicial Circuit
of Florida
Counsel for Petitioner

January 2, 1974

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, to Bruce Rogow, Esquire, City National Bank Building, Miami, Florida and to Phillip A. Hubbart, Public Defender, Justice Building, 1351 N.W. 12th Street, Miami, Florida this 8th day of January, 1974.

_____

Attorney

Supreme Court, U. S.
FILED
FEB 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Florida is reported at 332 F.Supp. 1107 (S.D. Fla. 1971). The Order adopting a plan to implement the original opinion is reported at 336 F.Supp. 490 (S.D. Fla. 1972). The District Court findings, requested by the Court of Appeals after oral argument are reported at 355 F.Supp. 1286 (S.D. Fla. 1973). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 483 F.2d 778 (5th Cir. 1973).

STATEMENT OF THE CASE

This case focuses upon the question of whether an arrested person, held in custody, has a Fourteenth Amendment due process right to a prompt judicial hearing to determine if probable cause exists to deprive him of his liberty. It also presents the question of whether an information, filed by a State Attorney, obviates that right.

The case does not involve persons arrested upon indictments returned by a grand jury. Therefore the right to a probable cause hearing after indictment is not presented. The Attorney General of Florida, in his amicus curiae brief, has invited this Court to reach that question. He has suggested that there is "no difference in fact or substance" between informations and indictments and that a grand jury is merely the alter ego of a state attorney (Amicus Curiae Brief of the State of Florida, pp. 4-5). That concession may be true. But this case does not require consideration of the problem. Thus the brief deals only with the rights of persons arrested upon some basis other than a grand jury indictment.

It must be emphasized that the respondents do not seek to declare unconstitutional or enjoin the use of informations per se. As a speedy method of screening and initiating charges, the information may be a useful tool.[1] The respondents merely assert that there must be a juducial determination of probable cause even if an information is filed, because a state attorney cannot, consistent with the Fourteenth and Fourth Amendments, determine probable cause in an ex parte proceeding. It is

[1] Katz, *Justice is the Crime, Pretrial Delay in Felony Cases*, The Press of Case Western Reserve University, Cleveland and London (1972), pp. 105-106.

that which the State Attorney has unsuccessfully opposed throughout this litigation.

The petitioners' Statement of the Case is essentially correct. However, a difference in emphasis necessitates a restatement by the respondents.

The case commenced on March 22, 1971 when Robert Pugh and Nathaniel Henderson filed a class action suit in the United States District Court for the Southern District of Florida against various Dade County, Florida public officials, including State Attorney Richard Gerstein. Pugh and Henderson were incarcerated in the Dade County Jail upon informations filed by the State Attorney. They sought a judicial hearing to determine probable cause for their detention (App. 3). Florida law forbade them such a hearing. *Sangaree v. Hamlin*, 235 So.2d 729 (Fla. 1970), *Baugus v. State*, 141 So.2d 264 (Fla. 1962). That rule persists today. Rule 3.131(a), Florida Rules of Criminal Procedure, *State ex. rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).

The plight of Pugh and Henderson was typical. Incarcerated defendants proceeded against by information often waited in jail for a month or more before they were even arraigned. That time was consumed by a process described by James Regan, the Administrative Assistant to the State Attorney (App. 44-60).

Mr. Regan testified that one day to two weeks or more after a police officer made an arrest, the officer would present himself to the State Attorney's office to file an information. (App. 47). Within one to three working days, the assistant state attorney who took the complaint, prepared it, processed it, and then it was signed by the State Attorney or one of his assistants. (App. 50). Thereafter the information was filed with the clerk of the

court, who assigned it to a judge so that the case could be calendared. That process took from one to seven days. (App. 56). On the "average", ten to fifteen days elapsed between the time the complaining party appeared in the State Attorney's office and the defendant appeared in court. (App. 57). Added to that period was the time it took for the complainant to go to the State Attorney's office (one day to two weeks or more [App. 471]). Thus, in excess of a month sometimes passed from arrest to arraignment. During that time no judicial inquiry was conducted to determine if probable cause existed for the person's detention. Indeed, no such opportunity existed until trial.

Some of the charges presented to the State Attorney's office were deficient and he declined to prosecute them (App. 45). Between January 1, 1970 and March 31, 1971, the State Attorney's office determined that 1165 charges were unwarranted and these were "no actioned" (App. 45). The "no actions" occurred only after the complainant (usually police officers) appeared before an assistant state attorney (App. 45).

Upon those facts the District Court issued its original opinion and final judgment declaring unconstitutional the Florida practice of denying a judicial determination of probable cause to persons proceeded against by information (App. 70-87; *Pugh v. Rainwater,* 332 F.Supp. 1107 [1971]). The Court asked for the submission of plans to provide preliminary hearings and adopted the only one suggested, a plan proposed by the Director of Public Safety of Dade County. (App. 88-96; *Pugh v. Rainwater,* 336 F.Supp. 490 [1972]). The State Attorney appealed to the Fifth Circuit.[2]

[2]It is interesting to note that the Attorney General of Florida, who appears here as Amicus Curiae, did not appeal. In fact, the Attorney General, representing several defendant judges, asked that they be permitted to become plaintiffs on the matter of preliminary hearings because they agreed that those hearings were commanded by the Constitution. (App. 63-64; 67).

Shortly thereafter, the judges of Dade County implemented their own plan to provide preliminary hearings for persons not charged by information. The State Attorney of course retained his power under Florida law to obviate the hearings if he chose to file an information.

After oral argument in the Fifth Circuit, the Court of Appeals requested the District Court to review the practices under the system implemented by the judges in Dade County to determine if constitutional infirmities still existed (App. 97-98).

Before the District Court could do that, the Florida Supreme Court promulgated Amended Rules of Criminal Procedure which contained, among other things, many of the requirements set out in the plan which the District Court had previously ordered implemented (App. 101-102). But those Amended Rules once again made clear that persons proceeded against by information filed by the State Attorney were not entitled to a preliminary hearing. Rule 3.131(a), Florida Rules of Criminal Procedure. The Rules totally excluded misdemeanants from preliminary hearings and permitted delayed preliminary hearings for those charged with offenses punishable by death or life imprisonment.[3] Rule 3.131(b), Florida Rules of Criminal Procedure.

[3]Pugh was charged with robbery, an offense punishable by life imprisonment. Henderson was charged with assault and battery, a misdemeanor. Although Pugh and Henderson no longer can benefit from a decision in this case (they have been convicted), a controversy remains because of the class action nature of the suit and the fact that the issue presented is an important constitutional question in the "low visibility" of the criminal process, *Sibron v. New York,* 392 U.S. 40, 52-53 (1968), which is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498 (1911); *Roe v. Wade,* 93 S.Ct. 705, 713 (1973).

The parties stipulated that the District Court re-assessment should also include the effect of the Amended Rules upon the plaintiffs' class (App. 103). After an evidentiary hearing the District Court found once again that permitting the State Attorney to obviate a preliminary hearing violated the Due Process Clause of the Fourteenth Amendment and the Fourth Amendment. The District Court also concluded that the exclusion of misdemeanants and the delayed hearings for capital or life imprisonment offenses ran afoul of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Fourth Amendment (App. 99-114, 115, 355 F.Supp. 1286 [1973]).

The Fifth Circuit affirmed, *Pugh v. Rainwater*, 483 F.2d 778 (1973). This Court granted certiorari.

SUMMARY OF ARGUMENT

I. A. The fundamental requisite of due process of law is "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

A due process hearing is required *prior* to the taking of property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969). A parolee, or probationer, convicted of a crime, is entitled to a hearing if the state seeks to revoke his conditional liberty. *Morrissey v. Brewer*, 408 U.S. 471 (1973). *Gagnon v. Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756 (1973).

Therefore a person arrested and incarcerated, who is presumed to be innocent, must be accorded a hearing before a judicial officer as soon as possible after his arrest

to determine whether probable cause exists to deprive the arrestee of his absolute liberty. The failure to accord such a hearing deprives a person of liberty without due process of law in violation of the Fourteenth Amendment.

B. The historical evolution of the preliminary hearing process and its nearly universal use by the states supports the proposition that such hearings are required by the Constitution. Due process is an evolving concept. *Rochin v. California*, 342 U.S. 165 (1952). The Court looks to the history of a practice and its utilization to determine its constitutional necessity. *Murray v. Hoboken Land Co.*, 59 U.S. (18 Howard) 272, 276-277 (1855). Preliminary examinations were used in England in the Twelfth Century and codified in the Sixteenth Century. 1 Holdsworth, *A History of English Law* (3d Ed. 1945); *Id.* 4 Holdsworth 529. The practice was followed in America before and after the revolution. Scott, *Criminal Law in Colonial Virginia*, 55-58 Univ. of Chicago Press, Chicago (1930). Smith, *Colonial Justice in Western Massachusetts*, 153-154, Harvard University Press, Boston (1961). In 1807 Chief Justice Marshall conducted the forerunner of the modern preliminary hearing, conducting an inquiry to determine if the charge of treason against Aaron Burr was supported by probable cause. *United States v. Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.A. Va. 1807). Today all states provide for preliminary hearings after arrest (See, *McNabb v. United States*, 318 U.S. 332, 342 (1943) and Appendix, infra). But in Florida, such a hearing is precluded if an information is filed.

This Court has extended the right to counsel and the right to cross examination to preliminary hearings. *Coleman v. Alabama*, 399 U.S. 1 (1970); *Pointer v. Texas*, 380 U.S. 400 (1965). Those rights have no value to a person who is denied the hearing itself. Due process requires that after a person is deprived of his liberty, he must be accorded a preliminary hearing to determine if probable cause exists.

II. A. An information filed by a state attorney cannot obviate the right to a probable cause hearing because the information process provides none of the elements which constitute a due process hearing. A hearing under the due process clause includes the right to notice of the charge, the right to confront and cross examine witnesses, the right to be heard in one's own defense and the right to be heard by a neutral and detached person. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756, 1761-1762 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970). The determination of probable cause made by the process of filing an information contains none of those elements and consequently is violative of the due process clause of the Fourteenth Amendment.

B. The Fourth Amendment commands that probable cause for an arrest be determined by a "neutral and detached" magistrate. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1971). A state attorney, who is a prosecutor, is not a neutral and detached magistrate. *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 453 (1970). Thus the State Attorney cannot be the sole arbiter of probable cause for arrest and detention.

III. The failure to accord preliminary hearings to all incarcerated misdemeanants, proceeded against by information or not, violates the equal protection clause, the due process clause and the Fourth Amendment. The total exclusion of misdemeanants from the opportunity for a preliminary hearing constitutes a classification which is arbitrary, irrational and without any compelling justification. The due process right to be heard is a fundamental right. *Grannis v. Ordean*, 234 U.S. 385 (1914). In order to justify a classification affecting a fundamental right, the state must show a "compelling interest." *Roe v. Wade*, ___ U.S. ___, 93 S.Ct. 705, 728 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The State has not

attempted to show such an interest. Nor has the State presented any rational basis for the classification. Thus under either test for equal protection, the classification imposed upon misdemeanants must fall under the Fourteenth Amendment's prohibition against classifications which cannot be justified. *Frontiero v. Richardson*, ___ U.S. ___, 93 S.Ct. 1764 (1973).

The denial of preliminary hearings to all incarcerated misdemeanants held upon informations or police arrests also violates the due process clause and the Fourth Amendment. *Morrissey v. Brewer*, 408 U.S. 471 (1973), *Coolidge v. New Hampshire*, 403 U.S. 443 (1970).

IV. A. The State Attorney's reliance upon *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom v. Oregon*, 229 U.S. 586 (1913) and *Ocampo v. United States*, 234 U.S. 91 (1914) is misplaced. Those cases permit prosecutions to be initiated by information without *prior* judicial determination of probable cause. Here *subsequent* determinations of probable cause are sought. The State Attorney's attempt to impute approval in *Beck v. Washington*, 369 U.S. 541 (1962), for the denial of subsequent probable cause hearings is without foundation. The issue of probable cause hearings was not present in *Beck*. The Court's comment approving informations filed "without even a prior judicial determination of probable cause" *Id.* 369 U.S. at 545, is merely a reaffirmation of *Ocampo* and *Lem Woom*. In no case has this Court approved the use of an information without a subsequent judicial determination of probable cause.

B. The State Attorney's reliance upon various Courts of Appeal decisions which hold that due process does not mandate preliminary hearings is equally misplaced. (Petitioner's Brief, pp. 16-17). Those cases contend with the argument that an otherwise valid conviction is vitiated by the denial of a preliminary hearing. This case makes no such argument. Thus those cases are not applicable to the limited assertion made here.

C. The fact that an information obviates the right to a preliminary hearing under Rule 5 of the Federal Rules of Criminal Procedure and Title 18 U.S.C. §3060(e) is not determinative of this case. The State and State Attorney erroneously contend that the mere existence of a federal rule and statute supports the maintenance of a constitutionally defective state practice. If the Florida practice does defy the Constitution, then the federal practice would share the infirmity. But even if the constitutional precedent lent itself to application to the federal system, it would have little practical impact because informations have limited use in federal prosecutions. Rule 7(a), Federal Rules of Criminal Procedure.

V. Neither abstention, the anti-injunction statute (Title 28 U.S.C. §2283) or *Younger v. Harris*, 401 U.S. 37 (1971) bar the relief granted by the Court of Appeals. This case presents no question of state law which could be construed by the Florida courts to avoid the federal constitutional issues. Consequently abstention is no bar. *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 511 (1972). Since this is a suit under Title 42 U.S.C. §1983, the anti-injunction statute (Title 28 U.S.C. §2283) is no barrier. *Mitchum v. Foster*, 407 U.S. 225 (1972). The plaintiffs have never sought to interfere with or enjoin any pending or future court proceedings. They seek only a pre-trial procedural right. The granting of such a right does not run afoul of the comity principles of *Younger v. Harris. Cf. Fuentes v. Shevin*, 407 U.S. 67, 71, n. 3 (1971).

Even if *Younger v. Harris* were applicable, this case would be an exception to it. A deprivation of liberty constitutes great and immediate irreparable injury. That injury cannot be redressed in the Florida courts in any proceeding because of their adamant support of the practice which causes the deprivation of liberty. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972), Rule

3.131(a), Florida Rules of Criminal Procedure. Such a situation constitutes an exception to *Younger v. Harris*, 401 U.S. 37, 46 (1972).

VI. Preliminary hearings for all incarcerated arrestees will enhance the administration of criminal justice. In this case, felony caseloads were reduced by twenty to twenty-five percent when preliminary hearings were utilized (App. 109). An American Bar Foundation study estimated that the clearance rate for felonies at the preliminary hearing stage was eighty percent in Chicago and sixty-five percent in Brooklyn, New York. McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1156 (1970). Other studies reflect similar results. Early resolution of felony and misdemeanor charges is promoted by a speedy preliminary hearing offering both sides an opportunity to assess the strength or weakness of the case and agree to a plea. The experience in Dade County, Florida shows that early resolution also reduces costs for jail maintenance (App. 109). Thus providing preliminary hearings will better serve both governmental and private interests.

ARGUMENT

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT AN ARRESTED PERSON, HELD IN CUSTODY, BE GIVEN A PROMPT JUDICIAL HEARING TO DETERMINE IF PROBABLE CAUSE EXISTS TO DEPRIVE HIM OF HIS LIBERTY.

A. The Decisions of This Court Which Prohibit the Taking of Property Without a Prior Hearing, and Prohibit the Taking of Conditional Liberty Absent a Subsequent Hearing, Require That the Taking of Absolute Liberty Be Followed By a Hearing.

Florida law denies preliminary hearings after arrest to persons proceeded against by an information filed by a

state attorney. Rule 3.131(a), Florida Rules of Criminal Procedure, *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972).[4] All misdemeanants, no matter how their prosecution is begun, are denied preliminary hearings. Rule 3.131(a), Florida Rules of Criminal Procedure.[5]

The Fourteenth Amendment provides that no state shall ". . . deprive any person of life, liberty, or property, without due process of law . . ." In *Armstrong v. Manzo*, 380 U.S. 545 (1965) this Court wrote:

> A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.
>
> *Id.* 380 U.S. at 552.

Due process has been held to require a hearing *prior* to the taking of one's property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969).

The hearing sought in this case is a *subsequent* one: a probable cause determination made promptly after arrest. That request is consistent with the concept of flexibility inherent in due process.

> Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.
>
> *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

The government function involved here is the State's duty to charge and arrest persons suspected of the commission of a crime. An adversary hearing prior to the exercise of that function might undermine the State's ability to apprehend a suspect. The accommodation which the plaintiffs urge—a prompt hearing subsequent to arrest—protects the government interest and the private interest, the fundamental right to absolute liberty.[6]

---

[4] That decision leaves no doubt that the prosecutor alone can determine probable cause without any hearing:

> When a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial.
>
> *State ex rel. Hardy v. Blount*, 261 So.2d at 174.

On February 4, 1974, the Florida Supreme Court amended Rule 3.131(b) of the Florida Rules of Criminal Procedure, extending the time for a state attorney to file an information and determine probable cause so that he would be better able to prevent preliminary hearings (Appendix to Brief, p. 4). If the prosecutor does not file an information in time to deprive a person of a preliminary hearing, and a judicial officer conducts one and finds no probable cause, the State Attorney can overrule that decision:

> . . . even if a defendant were granted a preliminary hearing and the committing magistrate discharged the defendant for lack of probable cause, the prosecuting attorney could nevertheless determine that probable cause exists and file an information charging the defendant with the commission of the offense.
>
> *State ex rel. Hardy v. Blount*, 261 So.2d at 174.

[5] The Rule supercedes Florida Statutes §§901.06 and 901.23 which required all persons arrested with or without a warrant to be brought before a magistrate. Those statutes were repealed. 2 West's Florida Session Laws, 1973, Chap. 73-27. Consequently Rule 3.131(a) and *State ex rel Hardy v. Blount* form the foundation of this controversy.

[6] There can be no quarrel over the essential nature of that right under the Constitution. In *Board of Regents v. Roth*, 408 U.S. 564 (1973) the Court, speaking of the liberty guaranteed by the Fourthteenth Amendment, wrote:

> Without doubt, it denotes . . . freedom from bodily restraint. *Id.* 408 U.S. at 572, quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Recently the Court has mandated similar hearings for persons whose liberty, because of conviction for a crime, was conditional. In *Morrissey v. Brewer*, 408 U.S. 471 (1972) the Court stated:

> We see therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege'. By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.
>
> *Id.* 408 U.S. at 482.

The Court provided the protection by requiring a rapid hearing:

> . . . due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. *Cf. Hyser v. Reed*, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. *Cf. Goldberg v. Kelly*, 397 U.S. at 267-271.
>
> *Id.* 408 U.S. at 485.

Gagnon v. Scarpelli, ___ U.S. ___, 93 S.Ct. 1756, 1759-1760 (1973) accorded similar protection to the termination of the conditional freedom of probationers.

Persons arrested and detained upon a police officer's suspicion of probable cause and a state attorney's information are deprived of their absolute right to liberty. They are presumed to be innocent. Due process compels the conclusion that they are entitled to a hearing after arrest to determine whether they have committed acts which justify the taking of their liberty.

B. The Historical Evolution of the Preliminary Hearing and Its Universal Recognition By All of the States As an Elementary Protection Against Arbitrary Arrest and Imprisonment Supports the Conclusion That Such Hearings Are an Essential Part of Due Process of Law.

This Court has long held that in determining whether a given procedure is an essential part of due process of law, it must look to the historical development of the procedure both in England and America. *Murray v. Hoboken Land Co.*, 59 U.S. (18 Howard) 272, 276-277 (1855); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908). Due process by its very nature is an evolving concept which cannot be fixed in the confines of a single formula

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The Amicus Curiae Brief of the Attorney General misapprehends the right respondents seek to protect. The Attorney General contends that the Florida Rules of Criminal Procedure which permit pre-trial discovery and require a speedy trial guard the rights of a defendant. But it is not the right to a fair or speedy trial which is lost by the denial of a preliminary hearing. It is the right to liberty for those improperly incarcerated which is irretrievably denied. It is small consolation for an innocent jailee that his lawyer may take depositions or that he must be tried within 60 days. One commentator has said:

> Although the preliminary examination is not a trial in the ordinary sense, it can have a profound effect on the individual involved. While being bound over for trial is often regarded as insignificant by judges and writers, it may result in three to six months incarceration, the degradation and expense of a criminal trial and irreparable harm to the accused's reputation, regardless of the ultimate outcome at the subsequent trial. Comment, *The Preliminary Examination-Evidence and Due Process*, 15 Kan. L. Rev. 374-376 (1967) (footnotes omitted).

and expresses in its deepest sense our civilization's revulsion against arbitrary governmental action. *Rochin v. California*, 342 U.S. 165 (1952); *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring); *Palko v. Connecticut*, 302 U.S. 319 (1937).

The practice of according prompt preliminary hearings to persons accused of crime has a long history. Indeed, "the preliminary hearing is an ancient institution," *Coleman v. Alabama*, 399 U.S. 1, 22 (Burger, C.J., dissenting) with roots in the common law. It was first used in England by the Crown's coronors, probably as early as the Twelfth Century, to conduct inquests into unnatural deaths. Comment, "The Preliminary Hearing – An Interest Analysis", 51 Iowa L. Rev. 64, 65 (1965); 1 Holdsworth, *A History of English Law* 82-85 (3d Ed. 1945).[7] In 1554 and 1555 Parliament passed the Statutes of Philip and Mary which required coronors and justices of the peace to conduct preliminary examinations in all felony cases. 1 Holdsworth 84; 4 Holdsworth 296. It is probable that these statutes gave legal sanction to practices which existed earlier without express statutory authority. Stephen, "Criminal Procedure From the Thirteenth to the Eighteenth Century" Vol. 2 *Select Essays in Anglo-American Legal History*, 459 (1968).

Although these early preliminary examinations were inquisitional in nature patterned after continental practices, 1 Holdsworth 296; 4 Holdsworth 528-529, they contained some of the characteristics of the modern preliminary hearing. Witnesses were required to appear before the magistrate to give testimony under oath which was later reduced to writing. Plunkett, *A Concise History of the Common Law* 432 (5th Ed. 1956). If a sufficient case was developed at the examination, the accused and witnesses were bound over for trial. 1 Holdsworth 84-85,

[7] Cited hereafter as "Holdsworth".

296, otherwise the case presumably ended. The magistrate's preliminary examination was designed to check various abuses of governmental power by the local sheriff, whose power the Crown viewed with suspicion.[8]

Gradually, with the development of a professional police force, the preliminary hearing evolved into an impartial, judicial inquiry. The magistrate became neutral and detached from the prosecution. The accused was accorded the rights of counsel, privilege against self-incrimination and compulsory process of witnesses. The function of the magistrate was no longer to investigate crime, but to impartially determine whether the prosecution had developed sufficient evidence against the accused to warrant a trial. 1 Holdsworth 296-297.

The basic preliminary hearing practice of England was followed in America both before and after the Revolution. Scott, *Criminal Law in Colonial Virginia* 55-58 Univ. of Chicago Press, Chicago (1930); Smith, *Colonial Justice in Western Massachusetts* 153-154, Harvard Univ. Press, Boston (1961). In 1807 Chief Justice John Marshall conducted the equivalent of a modern preliminary hearing on charges of treason against Aaron Burr. *United States v. Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.A. Va. 1807). Marshall delivered an opinion which established the prevailing law in America on preliminary hearings:

> On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in

[8] Katz, *Justice is The Crime – Pre-Trial Delay in Felony Cases*, 22-23, The Press of Case Western Reserve, London and Cleveland (1972). In the Twelfth Century the sheriff was "little less than a provincial viceroy" controlling all police, justice, fiscal and military matters in his local district. Maitland, *The Constitutional History of England* 232-233 (1911). The magistrates supplanted the sheriff's functions relating to arrest, bail and trial of accused persons. *Id.* 232.

chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused: but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it. I think this opinion entirely reconcilable with that quoted from Judge Blackstone. When that learned and accurate commentator says, that 'if upon an inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him, otherwise he must be committed to prison or give bail,' I do not understand him as meaning to say that the hand of malignity may grasp any individual against whom its hate may be directed, or whom it may capriciously seize, charge him with some secret crime, and put him on the proof of his innocence. But I understand that the foundation of the proceeding must be a probable cause to believe there is guilt; which probable cause is only to be done away in the manner stated by Blackstone. The total failure of proof on the part of the accuser would be considered by that writer as being in itself a legal manifestation of the innocence of the accused. In inquiring, therefore, into the charges exhibited against Aaron Burr, I hold myself bound to consider how far those charges are supported by probable cause.

Today every state has rules, statutes or constitutional provisions which contemplate preliminary hearings.[9] In most of the states which authorize prosecutions by information, the prosecuting attorney may file an information "only after the defendant has been accorded the

[9]The Appendix to this Brief contains a state by state analysis of those provisions.

right to a preliminary examination, unless he waives such examination and then only when he has been held for trial. . . ." 4 Wharton's *Criminal Law and Procedure* §1731, p. 517 (Anderson 1957); 41 Am. Jur.2d "Indictments and Informations" §20, p. 892 (1968). Florida, and a few other states[10] permit an information to vitiate the right to a preliminary hearing.

That practice emasculates the historic reason for the hearing:

> The object or purpose of the preliminary [hearing] is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.
>
> *Thies v. State*, 178 Wis. 98, 189 N.W. 539, 541 (1922).

This Court has recognized the critical nature of preliminary hearings. Defendants facing such hearings have been guaranteed the right to confront and cross examine witnesses, *Pointer v. Texas*, 380 U.S. 400 (1965), and the right to counsel, *Coleman v. Alabama*, 399 U.S. 1 (1970). Those rights have no meaning to a person denied the hearing itself.

Mr. Justice Frankfurter wrote:

> 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been

[10]According to Petitioners' Brief: Connecticut, Arkansas, Wyoming, Montana, Iowa and Washington share the Florida practice. (Brief of Petitioner, pp. 13-14).

> evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring).

The right to a prompt preliminary hearing after arrest fits securely into due process of law.

II.

AN INFORMATION FILED BY A STATE ATTORNEY CANNOT OBVIATE THE RIGHT TO AN INDEPENDENT ADVERSARIAL DETERMINATION OF PROBABLE CAUSE.

A. The Information Process Provides None of the Elements Essential to a Due Process Hearing.

At the least, the minimum requirements of a due process hearing are: (1) written notice of the charges; (2) an opportunity to confront and cross examine adverse witnesses; (3) the right to be heard and to present witnesses and documentary evidence; and (4) the right to have a neutral and detached person determine the question of probable cause. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Gagnon v. Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756, 1761-1762 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970). The information process provides none of these safeguards. The administrative officer for the State Attorney described the method (App. 44-59). It is wholly ex-parte. The arrestee has no role at all in the proceedings which affect his liberty.

Moreover, a finding of probable cause by the State Attorney cannot comport with the due process clause, because the State Attorney is not a "neutral and detached" person. In *Morrissey* the Court commented:

> In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case.
> *Id.* 408 U.S. at 485.

The State Attorney is the chief prosecuting official. It cannot be said that he meets the due process standard set in *Morrissey*. That becomes plain when one considers the requirement of neutrality and detachment embodied in the Fourth Amendment.

B. The State Attorney Cannot Be the Neutral and Detached Magistrate Required by the Fourth Amendment.

The Fourth Amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1970) this Court held that the Attorney General of New Hampshire could not be a neutral and detached person who would be permitted to authorize the issuance of a warrant for a Fourth Amendment search and seizure:

> We find no escape from the conclusion that the seizure and search . . . cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all.
> *Id.* 403 U.S. at 453.

A warrant for an arrest requires the same degree of neutrality and detachment. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1971).[11]

The State Attorney, very properly, does not attempt to distinguish his situation from the "neutral and detached" rules enunciated in *Coolidge*, *Shadwick* (or *Morrissey*). He is the chief prosecutorial official and therefore he cannot, consistent with the Fourth Amendment, be the sole arbiter of probable cause, prior to or subsequent to an arrest.

III.

THE FAILURE TO ACCORD PRELIMINARY HEARINGS TO ALL MISDEMEANANTS, PROCEEDED AGAINST BY INFORMATION OR NOT, VIOLATES THE EQUAL PROTECTION AND THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AND THE FOURTH AMENDMENT.

The Florida Rules of Criminal Procedure (Rule 3.131(a)) deny a preliminary hearing to arrested misdemeanants, no matter how their prosecution is instituted. Those persons suffer the same due process deprivation as persons charged with felonies. They are deprived of their liberty without an opportunity to be heard. If

[11]The rationale of *Shadwick* underlines the Fourteenth Amendment due process nature of this case. *Shadwick* held, on Fourth Amendment grounds, that a municipal court clerk was a neutral and detached person who could issue an arrest warrant. A decision here, based on the Fourth Amendment only, would permit a State Attorney to file an information and have a neutral and detached court clerk, or a judge, issue an arrest warrant. The question of what is due after arrest would be left unanswered. But it is that issue, the right to be heard after arrest, which is the core of this case. That is a due process matter.

charged by information, the Fourth Amendment violation also occurs.[12]

The right to be heard is a fundamental right, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), especially when one is being deprived of liberty. The guarantees of the Fourth Amendment are fundamental rights. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' ". *Roe v. Wade*, ___U.S.___, 93 S.Ct. 705, 728 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

Neither the State Attorney or the Attorney General, in their briefs, contend that any state interest is protected by the total exclusion of misdemeanants.[13] Originally, in the District Court, the State Attorney argued that a fair trial problem could be created if the magistrate determining probable cause in a misdemeanant's case had the same case assigned to him for trial. The Fifth Circuit response to that concern was succinct:

> The answer to this is not the denial of preliminary hearings, but the development of a system whereby judges are rotated to prevent such overlap. Indeed,

[12]The due process and Fourth Amendment discussions in Points I and II apply with equal force to this point. They will not be repeated since this argument focuses upon equal protection.

[13]Another classification, delayed hearings for persons charged with capital offenses or offenses punishable by life imprisonment, was never rationalized by the State Attorney or the State, nor alluded to in their briefs in this Court. The classification was struck as violative of equal protection by the District Court (App. 110-111, *Pugh v. Rainwater*, 355 F.Supp. at 1291-1292) and the Court of Appeals. *Pugh v. Rainwater*, 483 F.2d at 789-790. The point is not argued in this brief since the petitioner and the Amicus Curiae appear to accept the parity ordered below, if preliminary hearings are required.

> the Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit has already testified that preliminary hearings and misdemeanor trials are currently conducted by separate panels of judges in Dade County.
>
> *Pugh v. Rainwater*, 483 F.2d at 789.

The Court of Appeals also addressed the State's concern for the cost of providing preliminary hearings for misdemeanants. It found ample support for the District Court's finding that any increased costs would not be significant:

> The number of misdemeanor cases involving no pretrial incarceration and requiring no preliminary hearings comprised the bulk of all misdemeanors. Moreover, experience from the felony hearing system showed a reduction in felony caseloads and a savings to the taxpayers of the county.
>
> *Pugh v. Rainwater*, 483 F.2d at 789. (footnote omitted)

Even if there were some basis for the State's concerns, this Court has said:

> In any case, our prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, the Constitution recognizes higher values than speed and efficiency. . . . And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality.
>
> *Frontiero v. Richardson*, ___U.S.___, 93 S.Ct. 1764, 1772 (1973) (citations omitted).

Actually, providing jailed misdemeanants with preliminary hearings will promote speed and efficiency in the administration of criminal justice. Persons who should not be detained will be released, saving future court and police time. Pleas accepted at the preliminary hearing would result in similar savings.

Beyond that, the availability of such a hearing for incarcerated defendants would encourage pre-trial release of those persons, and relieve overcrowded jails.[14] It would also motivate courts to provide speedy trials for misdemeanants, promptly determining guilt or innocence, instead of probable cause. In Dade County, Florida, that result has already been achieved.[15]

Most misdemeanors arrests do not contemplate jail pending trial. Florida provides for the use of a summons in lieu of arrest and booking in misdemeanor cases. Florida Statutes §901.09; Rule 3.130(l) Florida Rules of Criminal Procedure. That method is rapidly gaining nationwide support. *Report on Police*, National Advisory Commission on Criminal Justice Standards and Goals,

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[14]The Director of the Dade County Jail testified that the majority of the 500 persons in his jail were awaiting trial and remained in custody because they were unable to post pre-trial monetary bond. (Deposition of Jack C. Sandstrom, reflected in the Record on Appeal, pages 305-314. See especially pages 308-312). The question of the constitutionality of money bail as applied to indigents was raised in the original complaint filed by Pugh, Henderson and two intervening plaintiffs. The District Court denied relief on that claim and a separate appeal was taken by the plaintiffs. That case, *Pugh v. Rainwater*, Fifth Circuit No. 72-1223, has not been decided.

[15]The State Attorney's Brief, at page 18, states:

> . . . most misdemeanants in Dade County, Florida have disposition of their cases on the merits in a shorter time than they could be accorded a preliminary hearing under the rules now in effect.

Those rules, Florida Rules of Criminal Procedure, Rule 3.131(b), as amended February 4, 1974, tolerate a five day lapse between arrest and preliminary hearing in felony cases. (The first appearance hearing is required within 24 hours of arrest, Rule 3.130(b), and the preliminary hearing 96 hours or four days later, unless an information is filed.) Actually the rules may condone a seven day lapse because Rule 3.040 excludes Saturdays, Sundays and holidays in the computation. The Court of Appeals refrained from deciding

Standard 4.4 "Citation and Release on Own Recognizance." (1973)[16]

Thus, an analysis of the competing interests involved in the classification which excludes misdemeanants compels only one conclusion: neither a compelling state interest or a rational basis exist to justify the classification. Under the strict equal protection test, *Roe v. Wade*, ___ U.S. ___, 93 S.Ct. 705, 728 (1973), or the relaxed standard *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961), the total exclusion of incarcerated misdemeanants from preliminary hearings must fall.

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the delay the Constitution might permit. *Pugh v. Rainwater*, 483 F.2d at 788. Respondents unsuccessfully cross-petitioned for certiorari on that point 42 L.W. 3325 (December 3, 1973, Justice Douglas dissenting). While not attempting to circumvent the Court's denial, respondents respectfully submit that the question of when a hearing is required by due process is a legitimate one. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A week of incarceration absent a hearing is too long, especially in light of *Argersinger v. Hamlin*, 407 U.S. 25 (1972) which precludes a loss of liberty for one day absent counsel. For totally excluded misdemeanants, *Argersinger* presents a compelling argument. It seems constitutionally incongruous to prohibit one day of incarceration after trial unless counsel is provided or properly waived but on the other hand, permit lengthy pre-trial incarceration without a hearing.

[16]The limited impact of giving jailed misdemeanants preliminary hearings is supported by a footnote in *Argersinger v. Hamlin*, 407 U.S. 25, 38 n. 10 (1972) reflecting that of 1,288,975 people convicted in the City of New York in 1970 for minor offenses, only 24 were incarcerated. With such small numbers being jailed after trial, it seems clear that the number of minor offenders suffering incarceration prior to trial must be *de minimus* in nearly all jurisdictions.

Another alternative to providing preliminary hearings to misdemeanants is suggested by the American Bar Association Special Committee on Crime Prevention and Control: take various types of conduct out of the court system. *Argersinger v. Hamlin*, 407 U.S. 25, 38 n. 9 (1972).

IV.

THE CASES RELIED UPON BY THE STATE ATTORNEY ARE NOT DETERMINATIVE OF THIS CASE.

A. *Hurtado v. California*, 110 U.S. 516 (1884) and Its Progeny Relate to Preliminary Hearings Prior to Arrest, An Issue Not Presented Here.

Throughout this litigation the State Attorney has maintained that *Hurtado v. California*, 110 U.S. 516 (1884), *Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914) and *Beck v. Washington*, 369 U.S. 541 (1962) justify the denial of preliminary hearings. Both the District Court and the Fifth Circuit examined those cases and concluded that they permitted informations without *prior* judicial determinations of probable cause and found them not determinative of the right to *subsequent* determinations of probable cause.

Hurtado v. California, 110 U.S. 516 (1884) permitted the use of an information instead of an indictment as a method for initiating prosecutions. But the process which was approved provided for a preliminary hearing *prior* to the information:

> We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, *after examination and committment by a magistrate, certifying to the probable guilt of the defendant*, with the right on his part to the aid of counsel, and to the cross examination of the witnesses produced for the prosecution, is not due process of law.
>
> *Id.* 110 U.S. at 538 (Emphasis supplied.)

The respondents do not object to an information *after* a preliminary hearing if probable cause is found. The information in that situation is merely a charging document based upon an independent determination of prob-

able cause. It is an information which is neither preceeded nor followed by an independent determination of probable cause which runs afoul of the Constitution. Thus, *Hurtado* is not inconsistent with the contentions advanced here.

Lem Woom v. Oregon, 229 U.S. 586 (1913) allowed the state to use an information where:

> The Constitution and laws of Oregon . . . did not require any examination by a magistrate as a condition *precedent* to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath.
>
> *Id.* 229 U.S. at 587 (Emphasis supplied.)

The Court held that there was no requirement for a judicial examination "*prior* to the formal accusation by the district attorney" *Id.* 229 U.S. at 590 (Emphasis supplied). The right to a preliminary hearing as a condition subsequent was not addressed.

In *Ocampo v. United States*, 234 U.S. 91 (1934) the defendants sought to vacate an order of arrest, and invalidate their subsequent conviction at trial:

> . . . upon the ground that it [the arrest] was made without any preliminary investigation held by the court and without any tribunal, magistrate, or other competent authority *having first determined* that the alleged crime had been committed, and that there was *probable cause* to believe the defendants guilty of it . . .
>
> *Id.* 234 U.S. at 93 (Emphasis supplied).

The Court found that there was no need for investigation by a judicial officer *prior* to arrest:

> . . . the function of determining that probable cause exists *for the arrest* of a person accused is only quasi judicial and not such that because of its nature it must necessarily be confided to a strictly judicial officer or tribunal.
>
> *Id.* 234 U.S. at 100 (Emphasis supplied).

That statement is wholly consistent with *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), which empowered a municipal court clerk to determine probable cause for arrest.

Although the prosecuting attorney in *Ocampo* determined that an offense may have been committed, his information and supporting affidavit were "made before the judge of the court of first instance, *who thereupon issued warrants of arrest.*" Id. 234 U.S. at 93 (Emphasis supplied). Thus, a neutral and detached person stood between the prosecutor and the defendant. Any other method, even prior to arrest, would deviate from *Coolidge v. New Hampshire*, 403 U.S. 433 (1970) and *Shadwick v. City of Tampa*, 407 U.S. 345 (1971). See also *McNabb v. United States*, 318 U.S. 332 (1942).[17]

Beck v. Washington, 369 U.S. 541 (1962), as the Court below stated, adds nothing to *Ocampo*. The State Attorney seeks to impute approval for his practice by reading new meaning into the Court's comment that since Washington abandoned its mandatory grand jury practice:

> . . . prosecutions have been instituted on informations filed by the prosecutor without even a prior judicial determination of 'probable cause'—a pro-

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[17] "The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must, with reasonable promptness, show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society."
McNabb v. United States, 318 U.S. 332, 343-344 (1942).

> cedure which has likewise had approval here in such cases as *Ocampo v. United States* . . . and *Lem Woom v. Oregon* . . . .
> *Id.* 369 U.S. 546.

The State Attorney maintains that the Court was "certainly aware" that Washington law did not require subsequent judicial determinations of probable cause (Petitioners' Brief, page 13). But *Beck* did not present the issue of probable cause hearings. The speculative assertion made by the State Attorney simply has no foundation. *Beck* is merely a reaffirmation of *Ocampo.*

Whatever the application of *Hurtado, Lem Woom* and *Ocampo,* they share one characteristic with the several Courts of Appeal decisions which the State Attorney urges in support of his argument. They all attempted to reverse otherwise valid convictions because of the denial of a preliminary hearing. No such attempt is made here, and that fact distinguishes all of the cases cited by the State Attorney.

B. The Several Courts of Appeal Decisions Cited By the State Attorney Are Not Applicable.

The State Attorney refers to several Courts of Appeal decisions which hold that preliminary hearings are not required by the Due Process Clause.[18] Each of those cases involved a defendant who was seeking to overturn his

[18] *Scarborough v. Dutton,* 393 F.2d 6 (5th Cir. 1968); *Kerr v. Dutton,* 393 F.2d 79 (2d Cir. 1968); *Sciortino v. Zampano,* 385 F.2d 132 (3d Cir. 1969); *Rivera v. Gov't of the Virgin Islands,* 375 F.2d 988 (4th Cir. 1967); *Barber v. U.S.,* 142 F.2d 805 (6th Cir. 1944); *U.S. v. Luxenberg,* 374 F.2d 241 (7th Cir. 1967); *Weber v. Ragen,* 176 F.2d 579 (8th Cir. 1949); *U.S. v. Gross,* 416 F.2d 1205 (9th Cir. 1969); *Austin v. U.S.,* 408 F.2d 808 (10th Cir. 1969); and *Swingle v. U.S.,* 389 F.2d 220 (D.C. Cir. 1968). The cases involving federal defendants arose out of indictments and are doubly inapplicable.

otherwise valid conviction because of the denial of a preliminary hearing. That relief is not sought here.

Those cases are grounded upon the sound theory that a fair trial is possible without a preliminary hearing. The question presented here is whether a pre-trial deprivation of liberty is fair without a preliminary hearing. The Fifth Circuit concluded:

> The distinction between a pretrial declaration of a right to a hearing and a post conviction appeal for reversal on the basis of the absence of such a hearing is a pragmatic and sensible distinction.
> *Pugh v. Rainwater,* 483 F.2d at 787.

The Courts of Appeal cases did not consider the right to a preliminary hearing in the context presented here. Therefore those decisions are not dispositive of the claims before this Court.

C. Rule 5(c), Federal Rules of Criminal Procedure And Title 18 U.S.C. §3060(e) Do Not Bar Relief.

Rule 5(c), Federal Rules of Criminal Procedure and Title 18 U.S.C. §3060(e) disallow preliminary hearings if an information is filed prior to the hearing date. It is argued that the existence of those provisions supports the constitutional validity of the practices under scrutiny here. The respondents respectfully submit that no such conclusion can be drawn. The federal information provision has never been questioned in this Court on analogous Fifth and Fourth Amendment grounds. In the absence of such an inquiry, it cannot be said that §3060(e) and Rule 5(c) govern the constitutional issues in the instant matter.

As a practical matter, the federal practice would be minimally affected by affirmance in this case. Under Rule 7(a), Federal Rules of Criminal Procedure, informations may be used only in misdemeanor cases, unless a felony defendant waives indictment. Misdemeanants generally

secure pre-trial release in the federal system, pursuant to the Bail Reform Act (Title 18 U.S.C. §3146 et. seq). In the state system, pre-trial detention is widespread[19] and preliminary hearings would have a more important impact.

V.

THE JUDGMENT OF THE DISTRICT COURT WAS A PROPER EXERCISE OF JURISDICTION. NEITHER ABSTENTION, THE ANTI-INJUNCTION STATUTE OR *YOUNGER v. HARRIS*, 401 U.S. 37 (1971), BAR RELIEF IN THIS CASE.

The State Attorney has commingled abstention, the anti-injunction statute (Title 28 U.S.C. §2283) and *Younger v. Harris*, 401 U.S. 37 (1971), in his argument that the decisions below were improper exercises of jurisdiction. None of those theories bar relief in this case.[20]

Abstention is a narrow doctrine properly utilized only when the state law "is susceptible of 'a construction by the state courts that would avoid or modify the [federal] constitutional question.'" *Lake Carriers Assoc. v. MacMullan*, 406 U.S. 498, 510 (1972). Those circumstances do not exist here. The Florida case law and rules

[19]Footnote 14, supra. See also Goldfarb, *Ransom*, Harper and Row, New York (1965).

[20]The Attorney General, in his Amicus Curiae Brief (pp. 12-16) asserts another jurisdictional issue. He contends that requiring preliminary hearings would allow an inferior court of Florida to overrule a higher court. No decision yet rendered has sought to delineate who should conduct preliminary hearings. Nor is such a determination sought here. All that is urged is that some judicial officer determine probable cause. Florida Statutes, §901.01 (as amended, 6 West Florida Session Laws, 1973 Chap. 73-334) provides that "each state judicial officer is a . . . committing magistrate." That provides sufficient flexibility to meet any contingency. The cases cited by the Attorney General are inapposite.

have never been ambiguous. They have been clear and consistent in their insistence that the Florida and Federal Constitutions are not offended by the use of an information in lieu of an impartial determination of probable cause by a judicial official. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972); *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); Rule 3.131(a), Florida Rules of Criminal Procedure.

Both the District Court opinion (332 F.Supp. at 1115) and the Fifth Circuit opinion (483 F.2d at 781-782) paid careful heed to *Younger*. Both Courts concluded, correctly, that the relief sought did not involve interference with pending or future prosecutions. *Fuentes v. Shevin*, 407 U.S. 67, 71, n. 3 (1972).

If *Younger v. Harris* were applicable, this case would fall within its exceptions. The Court in *Younger* said that no obstacle exists to an injunction when: (1) great and immediate irreparable injury is present; (2) Federal constitutional rights cannot be protected in State court and (3) the threatened constitutional deprivation cannot be eliminated by a single defense to the State prosecution. All of those circumstances exist here.

The loss of liberty constitutes great and immediate irreparable injury. The Florida law forecloses any constitutional challenge, either as a defense or by an equitable action, to the denial of a preliminary hearing. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972). Thus, the *Younger* exceptions are met. *Cf. Younger v. Harris*, 401 U.S. 37, 46 (1971).

VI.

PROVIDING PRELIMINARY HEARINGS WILL PROMOTE THE EFFICIENT ADMINISTRATION OF JUSTICE.

In addition to its value in protecting the individual against unfounded criminal charges, the preliminary hearing serves important governmental interests. It is an excellent screening device for determining which cases should or should not remain in the criminal justice system. Cases with insufficient evidence are promptly dismissed permitting trial courts to concentrate on the more serious matters.

Paulsen and Kadish, *Criminal Law and Its Processes* 920 Little, Brown & Co. (1962) note:

> "An enormous number of cases are eliminated by the preliminary examination. The Crime Surveys of the prohibition era found that in various states from 17 percent to 58 percent of all felony arrests failed to proceed beyond the preliminary examination stage. The cases are brought to an end at this early point by: (1) dismissal for want of prosecution, perhaps because witnesses failed to appear; (2) discharge for lack of probable cause; (3) filing of a nolle prosequi."

An American Bar Foundation study estimated that the clearance rate for felonies at the preliminary hearing stage was eighty percent in Chicago and sixty-five percent in Brooklyn, New York. McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases,* 56 A.B.A.J. 1154, 1156 (1970). In the instant case, Judge Tanksley, Chief Judge of the Magistrate's Division of the Eleventh Judicial Circuit of Florida, estimated that the preliminary hearing system had reduced felony caseloads by twenty to twenty-five percent in Dade County, Florida. *Pugh v. Rainwater,* 483 F.2d 778, 787 (5th Cir. 1973).

Prompt preliminary hearings also provide an excellent vehicle for early decisions on bail or release on personal recognizance. *Report on Courts,* National Advisory Commission on Criminal Justice Standards and Goals, Standard 4.5 (1973).

Moreover, the hearings bring the parties together at an early stage for plea bargaining purposes. Since counsel is required, *Coleman v. Alabama,* 399 U.S. 1 (1970), charges may be reduced or otherwise plea bargained at an early stage of the proceedings, rather than waiting until trial to achieve the same disposition. See, Katz, *Justice is the Crime: Pre-Trial Delay in Criminal Cases,* The Press of Case Western Reserve University, Cleveland and London, (1972), pp. 211-212.

Each of these benefits serves the public interest by promoting an efficient, economical administration of criminal justice. The public interest is also served, of course, by the protection which a preliminary hearing offers for the right to liberty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of brief for respondents was served by United States Mail upon Leonard Mellon, Esquire, Assistant State Attorney, 2070 Main Street, Sarasota, Florida; Joseph Durrant, State Attorney's Office, Metropolitan Justice Building, 1351 N.W. 12 Street, Miami, Florida and George R. Georgieff, Assistant Attorney General, Attorney General's Office, The Capitol, Tallahassee, Florida 32304, this 7 day of February, 1974.

BRUCE S. ROGOW

Counsel for Respondents

APPENDIX

PRELIMINARY HEARING PROVISIONS OF THE FIFTY STATES

ALABAMA–Code, 1940, Tit. 15, §133

ALASKA–Cr. R. 5(d)

ARIZONA–17 A.R.S. Rules of Criminal Procedure, Rule 5.1

ARKANSAS–Stat., 1964, Tit. 43, §43-603

CALIFORNIA–Penal Code, 1971, §859b

COLORADO–1 C.R.S. Rules of Criminal Procedure, Rule 5(c)

CONNECTICUT–C.G.S.A. §54-76a

DELAWARE–13A D.C.A. Rules of Criminal Procedure, Rule 5(c)

FLORIDA–Rules of Criminal Procedure, Rule 3.131

GEORGIA–Code, 1972, Tit. 27, §27-407

HAWAII–Rev. Stat., 1971, Tit. 37, §710-7

IDAHO–Code, 1973, Tit. 19, §19-804

ILLINOIS–S.H.A. Ch. 38, §109-3 (1963)

INDIANA–Burn's Ind. Stat. Ann., 1937, Tit. 9, §§704, 704a (1949)

IOWA–I.C.A. §761.1 (1939)

KANSAS–K.S.A., Art. 22, §22-2902 (1970)

KENTUCKY–7 K.R.S., Rules of Criminal Procedure, Rule 3.04

LOUISIANA–Code of Criminal Procedure, 1966, Tit. 7, Arts. 291, 292

MAINE–Rules of Criminal Procedure, Rule 5(c)

MARYLAND–Code, 1957, Art. 27, §592 (1973)

MASSACHUSETTS–M.G.L.A. Ch. 276, §§37A-42 (1959)

MICHIGAN–M.C.L.A. §766.1

MINNESOTA–M.S.A. §§628.31, 629.50

MISSISSIPPI–Code, 1942, Tit. 99, Ch. 15, §99-15-5

MISSOURI–V.A.MS. §544.250 (1972), Rules of Criminal Procedure, Rules 23.02, 23.03

MONTANA–Rev. Code, 1967, Tit. 95, §95-902

NEBRASKA–Rev. Stat., 1943, Ch. 29, §29-506

NEVADA–Rev. Stat., 1971, Tit. 14, Ch. 171, §171.196

NEW HAMPSHIRE–Rev. Stat., 1955, Ch. 596

NEW JERSEY–Rules Governing Criminal Practice, Rule 3:4-3

NEW MEXICO–Stat., 1972, Ch. 41, §41-23-20

NEW YORK–Code of Criminal Procedure §180.60 (McKinney 1971)

NORTH CAROLINA–Gen. Stat., Ch. 15, §15-87

NORTH DAKOTA–Century Code, 1943, Tit. 29, §§29-07-11, 29-07-18

OHIO–Rev. Code, Tit. 29, §§2937.10-2937.12 (1960) 2945.71 (1974)

OKLAHOMA–Const. Art. 2, §17, Laws, 1961, Tit. 22, §258

OREGON–O.R.S. 1963, Tit. 14, §§133.610, 133.810, 133.820

PENNSYLVANIA–Pa. R. Crim. P. 120

RHODE ISLAND–Gen. Laws, 1956 (1969 reenactment), Tit. 12, §12-10-5

SOUTH CAROLINA–Code, 1962, §§43-231, 43-232

SOUTH DAKOTA–S.D.C.L., 1967, Tit. 23, §§23-27-1 - 23-27-16

TENNESSEE–Code, 1971, §40-1131

TEXAS–Vernon's Ann. C.C.P. Art. 16.01

UTAH–U.C.A., 1953, Tit. 77, §77-15-3

VERMONT–Rule 5, Vermont Rules of Criminal Procedure

VIRGINIA–Code, 1950, Tit. 19, §19.1-101 (1968)

WASHINGTON–Rev. Code, Tit. 10, §§10.16.040 (1952), 10.16.080 (1954)

WEST VIRGINIA–Code, 1965, §62-1-8

WISCONSIN–U.S.A. §§970.03, 971.02 (1969)

WYOMING–Rules of Criminal Procedrue, Rule 7

NOT FINAL UNTIL FEBRUARY 15, 1974, AND IF REHEARING FILED, UNTIL SAID PETITION IS DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1974

IN RE:	
RULE 3.131(b), FLORIDA RULES OF CRIMINAL PROCEDURE	CASE NO. 44,958

Opinion filed February 4, 1974

A Case of original jurisdiction – Florida Rules of Criminal Procedure

PER CURIAM.

Under the present Rules of Criminal Procedure, every defendant charged with a non-capital offense is entitled to a preliminary hearing within 72 hours if he is in custody. The purpose of this provision was to speed the filing of information and thereby require the state attorney to determine, within 72 hours, whether a defendant will be prosecuted or should be released.

Before filing an information every state attorney should not only seek probable cause in his investigation, but also determine the possibility of proving the case beyond and to the exclusion of every reasonable doubt. If the latter cannot be accomplished, no information should be filed and the defendant should be released. The rule requiring this determination within 72 hours will result in the filing of some cases in which the state attorneys do not have a firm belief as to the integrity of the charge, or the state attorneys will be required to invoke a complete preliminary hearing system, with all its attendant costs and burdens upon the judicial system as well as the people of the state.

The state attorneys have requested that this rule be amended so that they will be allowed the period of 96 hours within which to complete their investigation of the case and determine whether to file an information or dismiss the charge. If the time is extended to 96 hours, the number of cases in which no information is filed will be increased and the number of cases in which a *nolle prosequi* of an information is entered will be reduced. The amendment will prevent charges from being filed against innocent people in cases where the state objectively could not prove the charges brought by the investigating law enforcement agency.

In an effort to expedite the dismissal of unwarranted charges brought against innocent citizens and in an effort to facilitate the operation of the criminal justice system with least inconvenience to the citizen, Rule 3.131(b) is hereby amended so that the same shall read as follows:

RULE 3.131. PRELIMINARY HEARING

* * *

(b) In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 96 hours from the time of the defendant's first appearance. In all capital offenses and offenses punishable by life imprisonment, the preliminary hearing shall be held within seven days of the time of the defendant's first appearance. Should the charges as set forth in paragraph (a) of this rule not be filed, or the preliminary hearing as set forth in this paragraph not be held within the time period herein specified, then the court shall release the defendant on a personal surety bond, without the necessity of additional surety signing thereon, together with such other conditions as to the court may seem just and proper under the circumstances.

This rule shall take effect on March 1, 1974.

It is so ordered.

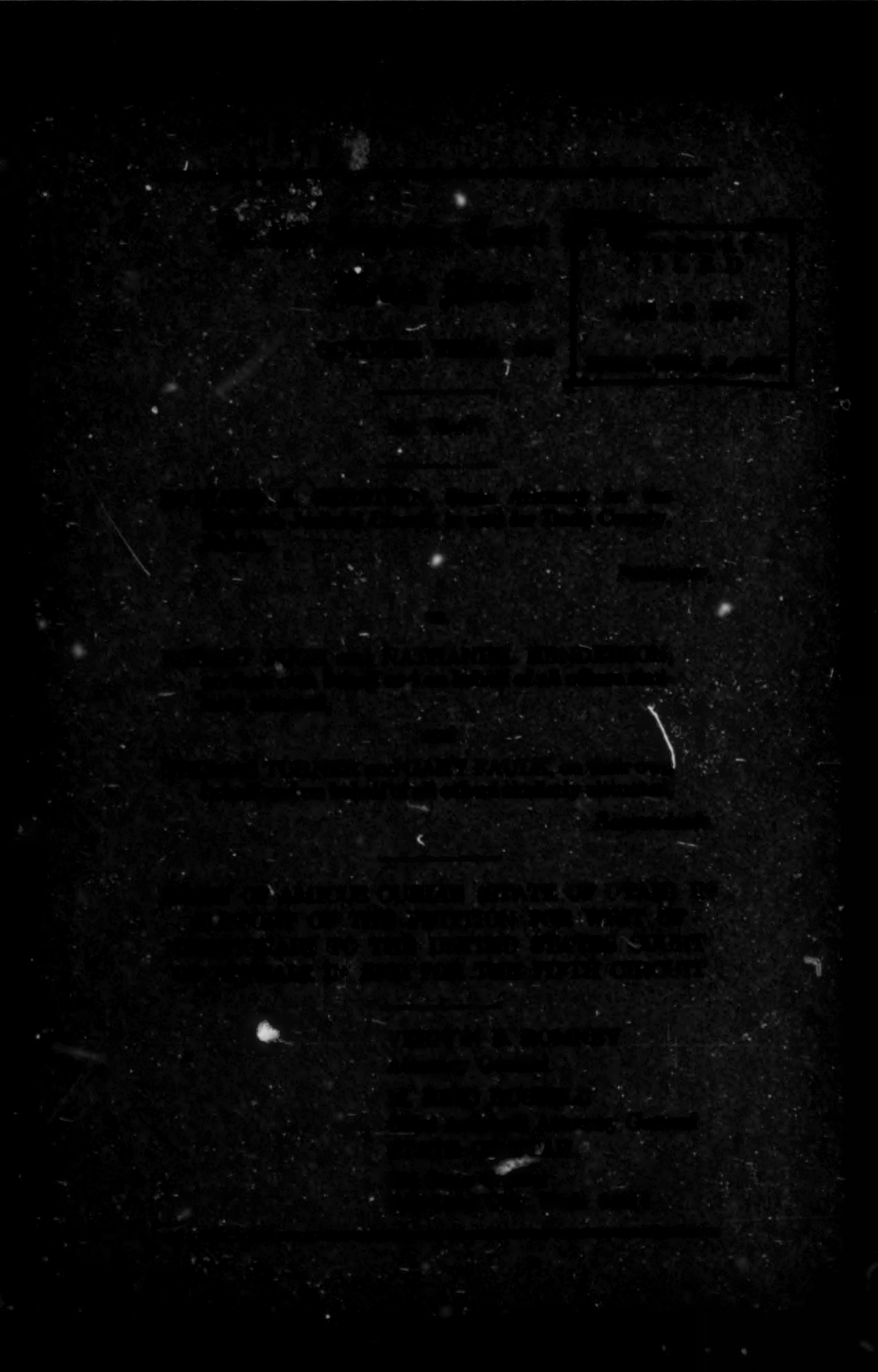
CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., Concur
ERVIN, J., Dissents with opinion
BOYD, J., Dissents

ERVIN, J., dissenting:

This postponement by rule for yet another twenty-four hours (increasing the time to four days) within which preliminary hearings must be afforded uncharged accuseds held in custody is yet another retreat from the modern view that deprivation of an accused's liberty should not be unduly prolonged by the slowness of the prosecutorial machinery. Originally it was provided in the American Bar Association's proposed Minimum Standards for Criminal Justice that the time of such detention in custody of accused felons for crimes less than capital and misdemeanants should be only twenty-four hours.

This further postponement of the time during which an accused may be held in custody for prosecutorial investigation—after the arresting officer has made the arrest—compounds an already undue length of time for state action. An accused is entitled to an expeditious determination of whether there is probable cause for charging him and holding him in further custody.

This modification is but another imposition upon poor people unable to secure bail upon arrest. It is a relaxive indication there is to be no incentive for speeding up of the state procedures for determining whether accuseds should be further detained. It is contrary to the spirit of the Constitution for early release of the innocent and the speedy charging and prosecution of the guilty.



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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly sittuated,

Respondents.

BRIEF OF AMICUS CURIAE (STATE OF UTAH) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

The State of Utah respectfully submits this Brief Amicus Curiae through its Attorney General, Vernon B.

Romney, thereby supporting Petitioner's Petition for Writ of Certiorari.

This Brief adopts the entire argument laid forth by petitioner heretofore filed in this Court, and further submits that the cause should be reversed because of the important relationships and rights of the state court system which have been abridged.

ARGUMENT

A UNITED STATES DISTRICT COURT JUDGE HAS NO JURISDICTION TO INTERFERE BY DECLARATORY AND INJUNCTIVE ACTION WITH DULY CONSTITUTED STATE CRIMINAL PROCEEDINGS ON THE QUESTION OF PRELIMINARY HEARINGS.

The conflict between State and Federal courts as pertaining to injunctions has been an age old battle which should have been well settled by earlier decisions of the United States Supreme Court that have limited the power of District Courts in granting injunctions which interfere with state proceedings. Such holdings have often, however, as in the present case, been ignored by the lower Federal Courts in grasping for standards they feel should apply.

The United States Congress emphasized the separation of Federal and State Systems by enacting what has become known as the "anti-injunction statute." This is found in 28 U. S. C. § 2283 and states:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Therefore, not only is there a presumption against federal interference but clearly, the language of the statute indicates the express desire that only through granted exception can injunctive relief be granted.

This position has been upheld by the United States Supreme Court in *Atlantic Coastline R. R.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970), where the Court said the following:

> "[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their Courts, the exceptions should not be enlarged by loose statutory construction."

The present case finds the lower court attempting to do that which the Court deplored above. The simple belief that the lack of preliminary hearings "could" be disadvantageous if certain circumstances arise surely does not meet any of the exceptions alluded to.

As early as *Stefanelli* v. *Minard*, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951), this Court held that Federal Courts should not intervene in state criminal proceedings on the grounds that those proceedings violate procedural due process. Indeed, this position has never been abandoned. It has been expanded and molded through such decisions

as *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965), that limited federal intervention to injunctions of constitutionally violative statutes, and *City of Greenwood* v. *Peacock*, 384 U. S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966), where the Court refused to uphold an injunction based on the argument that the defendants could not get a fair trial in the state courts.

Recently, this Court reiterated and restored to this controversy a well set out guideline as to the issuance of injunctions. The case of *Younger* v. *Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), defined the proper relationship between federal district courts and pending state court criminal proceedings, holding that an injunction or declaratory judgment will issue in a pending situation only under extraordinary circumstances that must include bad faith law enforcement. This is harmonious with the established custom of the federal courts to respect and confide in the competence of state courts. Tbis Court did not limit *Younger*, *id.*, to bad faith law enforcement, but to harassment, or any other unusual circumstance that would call for equitable relief. Such must be shown to the judge sitting in the case.

In defining even further this relationship, the Court said in *Younger*, *id.*, that the federal system must be one:

> ". . . in which there is sensitivity to the legitimate interests of both state and National Governments, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

It is the position of the State of Utah that the reversal of the Court of Appeals is absolutely essential in adhering to the standards this Court has established in *Younger*, *id.*, and in earlier cases. For, in analyzing the facts of the pending appeal, it is most certainly evident that no convincing showing was made that irreparable injury would occur by normal implementation of the state court process.

This Court has never held that every injury beyond that associated with the defense of a single prosecution constitutes an irreparable injury. It has indicated in *Younger*, id., however, that injury that is incidental to every criminal prosecution is not irreparable. *Fenner* v. *Boykin*, 271 U. S. 240 (1926), as well as other cases indicate that a cardinal element of irreparable harm is the requirement common to all equity proceedings and that the plaintiff have no adequate legal remedy.

Though normal state criminal proceedings might not including a preliminary hearing, an individual is still capable of raising not only constitutional issues, but in challenging any procedure imposed on him at or before trial. Simply because he raises the issues of preliminary hearing, and the state does not have such a hearing, does not mean that the individual is entitled to obtain an injunction from the federal judiciary. Rather, recent decisions of this Court alluded to below indicate he does not have such a right.

In two recent decisions, this Court has upheld the holding previously cited from *Younger*, *supra*. Specifically, in *Oshea* v. *Littleton*, ... U. S. ....., 94 S. Ct. 669 (1974), the Court said:

> "Respondents have failed, moreover, to estab-

lish the basic requisites of the issuance of equitable relief in these circumstances — the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. We have already canvassed the necessarily conjectural nature of the threatened injury to which respondents are allegedly subjected. And if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which would provide relief from the wrongful conduct alleged. In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available."

Such remedies are available in Florida although it is readily admitted that the factual differences of the two cases are substantial. What is to be pointed out is simply that the elements of irreparable and immediate injury must be proven and if not proven there must be clear evidence that no remedies exist at law. This the defendants have failed to establish.

Finally, *Steffel* v. *Thompson*, ... U. S. ....., 94 S. Ct. 1209 (1974), is supportive of *Younger*, *id.*, the Court therein making the following remarks relating to the issuance of an injunction against state proceedings:

> "But, except for statutes that are 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . .' Younger v. Harris, *supra*, 401 U. S., at 53, 91 S. Ct., at 755, the rationale of those cases has no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions

> on the constitutional point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and state court systems, with a special regard for the state's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not."

The Tenth Amendment to the Constitution specifically allows the States to handle those matters which concern its procedure, for:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Certainly the right to govern and control one's criminal processes — especially where there is no indication of harm or a denial of rights — belongs to the state courts and the laws they interpret. To hold otherwise would be a flagrant abridgement of this Supreme law of the land.

It is therefore submitted to this Court that the Court of Appeals erred in allowing the issuance of the injunction to stand. Such usurpation of authority has never been intended by this Court "unless" there is irreparable injury which has not been established in this case.

CONCLUSION

It is because of this long-standing precedence cited above that the State of Utah as *Amicus Curiae* in this action propounds to this Court that the federal judiciary

should not be permitted to interfere with proper state court criminal proceedings. Indeed, it is imperative that the states be permitted to carry on unfettered their respective law enforcement efforts and prosecutions. Such separations of powers was clearly intended by the Tenth Amendment to the United States Constitution, quoted above.

It is therefore submitted that the Court of Appeals should be reversed, which action requires first the granting by this Court of the State of Florida's petition for writ of certiorari.

Respectfully submitted,

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Attorney General
for the State of Utah

M. REID RUSSELL
Chief Assistant Attorney General

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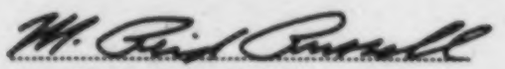
CERTIFICATE OF SERVICE

I, M. Reid Russell, Chief Assistant Attorney General for the State of Utah, Counsel for *Amicus Curiae*, hereby certify that on the 8th day of August, 1973, I served copies of the Brief of *Amicus Curiae* on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents; and Peter L. Nimkoff, Esquire, Suite 607 Ainsley Building, 14 N. E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by a duly addressed envelope with postage prepaid.



M. REID RUSSELL
Chief Assistant Attorney General

Supreme Court, U. S.
FILED
AUG 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for 11th Judicial Circuit of Florida,

Petitioner,

vs.

ROBERT PUGH, et al.

Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

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MALACHY R. MURPHY,
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IN THE

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RICHARD E. GERSTEIN, State Attorney for 11th Judicial Circuit of Florida,
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vs.

ROBERT PUGH, *et al.*
Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

This brief is filed as an amicus curiae in the case of *Gerstein v. Pugh*, No. 73-477 at the invitation of the Clerk of the Supreme Court of the United States by letter dated June 6, 1974. Washington is among those states which, like Florida, does not require a preliminary hearing to be held following the prosecutor's filing an information on a criminal charge. A prosecutor may obtain a preliminary hearing by filing a complaint in an inferior court which will conduct a preliminary hearing. However, the prosecutor need not take this course of commencing criminal action, or he may, after filing the

complaint, avoid the preliminary hearing by filing an information in superior court. Normally, a prosecutor who is uncertain of probable cause to proceed to trial files a complaint to get a judge's view.

The general questions which we see predominant in this case are:

(1) Does *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), require the court to abstain from ruling on this matter because such ruling would affect the constitutionality of a state statute and a criminal action in progress?

(2) Does the fourteenth amendment due process clause as applied to the fourth amendment prohibiting unreasonable searches and seizures require that a preliminary hearing be conducted following the filing of a prosecutor's information?

(3) Does the mechanism of the prosecutor's information fulfill the requirement for due process in the criminal system even though no preliminary hearing is employed?

(4) Is the value of preliminary hearings in achieving due criminal process sufficient to offset the substantial costs of instituting such hearing where they are not currently employed?

I

ABSTENTION

Federal courts must abstain from taking affirm-

ative action in a case initiated in federal courts to declare a state procedural statute unconstitutional.

This court has refused to pass on the constitutional validity of state statutes affecting pending or future state court prosecutions when an adequate remedy at law exists. *Younger v. Harris, supra.* Here the effect of the action of the courts below is to hold inoperative a state statute prescribing certain methods for commencing and prosecuting a criminal action, *viz*, by an information of the prosecutor without a preliminary hearing. *Bradley v. Florida*, 265 So.2d 532 (Fla. App. 1972), cert. denied, 411 U.S. 916, 93 S.Ct. 1543, 36 L.Ed.2d 307; Rule 3.131, Rules of Criminal Procedure, Florida Rules of Court, 1974.

The court of appeals below does not view its action as interfering with a state prosecution since it only challenged "the state's practice of considering the state attorney a sufficient judge of probable cause to hold arrestees until arraignment or trial." *Pugh v. Rainwater*, 483 F.2d 778, 782 (1973). What effect does the court's action have but, by this challenge and response, to attack the state prosecution? The district court attempted to avoid this dilemma by suggesting that its assumption of jurisdiction should not interrupt the prosecution. *Pugh v. Rainwater*, 332 F.Supp. 1107, 1115 (S.D. Fla. 1971). If prosecution was not interrupted in 1971, then a case or controversy is lacking here because presumably the prosecution would have been completed, and this court would be without jurisdiction.

Concerning whether an adequate remedy at law is available to a defendant claiming to have been denied a constitutional right, the court of appeals points out that not every pre-trial unconstitutional procedure, assuming there is one here, will entitle a state defendant to relief in federal court. For example, the victim of an unconstitutional search and seizure has no right to an injunction, but must seek to have the evidence excluded at trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A defendant who has not obtained a preliminary hearing and who argues the unconstitutionality of proceeding to trial without a magistrate's finding of probable cause stands in a substantially similar situation and can expect the prosecution to be dismissed at trial if the prosecution fails to establish a *prima facie* case. In addition, there is always the possibility that the defendant may, prior to trial, move to dismiss the information alleging a denial of due process in the filing of an information for which there exists no probable cause to believe he has committed the crime stated. This motion, denied in state courts, could be appealed to the federal courts.

II

CURRENT CONSTITUTIONAL STATUS OF A PRELIMINARY HEARING

As presently interpreted, the fourteenth amendment "Due Process" clause does not require a preliminary hearing following the filing of the Prosecutor's Information.

In this case appellants appear to have relied to a great extent on *Lem Woon v. Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1913), its progenitor, *Hurtado v. State of California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), and *Ocampo v. United States*, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914). All of these are cited for the proposition that a preliminary hearing testing the sufficiency of a prosecutor's information *prior* to actual trial is not constitutionally required. In *Lem Woon* and, to some extent, *Ocampo*, this court held that the fourteenth amendment "Due Process" clause does not require a preliminary examination by a magistrate prior to the filing of an information. Ibid *Lem Woon* at 590, 33 St.Ct. 784.

The court has stated, referring to the *Hurtado* line of cases:

> "But since, as this court has so often held, the 'due process of law' clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states." Ibid at 590, 33 S.Ct. at 784.

The Court of Appeals for the fifth circuit sees a significant distinction between *Hurtado*, *Lem Woon*, and *Ocampo* on one hand and this case on the other because here the question is whether due process requires a preliminary examination *after* an information is filed. *Pugh v. Rainwater*, *supra*. There

appears to be a distinction here, but it is, we submit, a distinction without difference, a distinction which in practice does not change the impact of criminal procedures on the defendant. The question before the Court in *Lem Woon* involved basically the constitutional validity of the prosecutor's information as a means of initiating the criminal processes. Since indictment by grand jury was not essential to the existence of due process in state criminal actions, the court was unwilling to say that a preliminary hearing prior to an information was essential. Given the Courts view of the matter, would it be logical then to argue that the question of a preliminary hearing to be conducted after an information is somehow different? A defendant's prospects of pre-trial confinement are not affected by whether the preliminary hearing is conducted first and, assuming a finding of probable cause, charged later by information or whether the information is filed first and then tested by a preliminary hearing. *Lem Woon* is authority for the Florida procedure observed prior to this case.

In Washington, criminal charges may be commenced in one of four ways: (1) an information filed by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) criminal complaint filed before a magistrate. Of these, the most common is the prosecutor's information. A complaint before a magistrate whether filed by the prosecutor or another complainant is followed by a preliminary hearing unless the prosecutor subsequently files an information in Superior Court. *State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971).

Indictment by grand jury was adopted in the Fifth Amendment of the United States Constitution as a fair procedure for charging criminal acts in federal courts. *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 408 L.Ed. 397 (1956). *Hurtado v. California*, *supra*, indicated that the method was not the only fair way such proceedings could be instituted. *Lem Woon v. Oregon*, *supra*, and *Ocampo v. United States*, *supra*, indicated that indictment by prosecutor's information even without a preliminary hearing was another fair procedure. This approach was recognized by the Court in *Beck v. Washington*:

> "Ever since *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some years ago. Since that time prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as *Ocampo v. United States*, 234 U.S. 91, 345 S.Ct. 712, 58 L.Ed. 1231 (1914) and *Lem Woon v. Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed 1340 (1913)." *Beck v. Washington*, 369 U.S. 541, 545, 82A S.Ct. 955, 957-958, 8 L.Ed.2d 98, 104-105 (1962).

Respondent here asserts in essence that the information process without a judicial examination is unfair, and contrary to the fourth and fourteenth amendments. This assertion is apparently made not on the grounds that the Florida prosecutor, or prosecutors in general, are in the practice of wilfully or wantonly filing informations in cases in which there is insufficient evidence to initiate criminal proceedings or even on the grounds of doing so carelessly with such frequency as to make the practice of prosecutor initiated informations constitutionally unacceptable. They assert simply that fairness cannot be and is not obtained by a process from which judicial review of the charging decision is omitted. Therefore, in order to sustain the Circuit Court below, and respondent's position, *Lem Woon* and *Ocampo* must be reversed. The Court should not do that here. See also: *Austin v. United States*, 408 F.2d 808 (1969); *Sciotino v. Zampano*, 385 F.2d 132, 134 (1967), cert. denied 390 U.S. 906, 885 S.Ct. 820, 19 L.Ed.2d 872 (1968); *State v. Ollison*, 68 Wn. 265, 411 P.2d 419 (1966); cert. denied *sub nomine Wallace v. Washington*, 385 U.S. 874, 87 S.Ct. 149, 17 L.Ed.2d 101 (1966).

III

THE DECISION TO CHARGE AND THE PRELIMINARY HEARING

An analysis of the prosecutor's role in filing an information and of the effect in practice of preliminary hearings justifies a conclusion that there is

no absolute constitutional due process right to a preliminary hearing pursuant to the fourth and fourteenth amendments.

The circuit court below has cited language from several Supreme Court cases to the effect that judicial functions ought not become entangled in law enforcement, lest he who judges is tainted by the zeal of the chase and lose his power to judge objectively. The court cites *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1942), which involved a police failure to bring an arrestee before a magistrate pursuant to statute until interrogation was completed. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970), which disapproved the practice of a prosecutor issuing search warrants. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971), which involved the requirement for a custody hearing for a parolee on suspicion of another offense. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1971), concerning the authority of a clerk of a municipal court to issue an arrest warrant, and *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1938, 32 L.Ed.2d 556 (1971), which affected the legal efficacy of executing a lien on property without a prior hearing. None of these cases, of course, decided the issue specifically before this Court, and the circuit court did recognize a long line of fifth circuit cases which discounted "the existence of a due process right to a preliminary hearing." *Pugh v.*

Rainwater, supra, at 786. The circuit court, however, found that the sentiments and reasoning expressed in the Supreme Court cases cited applied to the circumstances of the instant case and concluded that the decision as to legal sufficiency to prosecute a given case is judicial and cannot be made finally without judicial review of the evidence, that the prosecutor, because of his advocate's role, is constitutionally incapable of making this decision, and that the due process clause requires states to conduct a preliminary hearing after an information is filed in all cases, felony and misdemeanor, where confinement could result. The court distinguished the contrary cases within the circuit by noting that in those cases the issue arose in the context of a challenge to the validity of a conviction on a charge filed by information without benefit of a preliminary hearing and did not come to the court solely on the question of a due process right to a preliminary hearing. *Pugh* at 786-787.

The Court of Appeals held that "due process abhors even the appearance of * * * entanglement between the prosecutorial and judicial functions as exist under the Florida information prosecution system" (*Pugh* at 787), and proceeded to adopt new criminal procedural rules for Dade County, Florida. The court did so in the belief that the new system will improve the quality of criminal justice in the state without adding to the cost of maintaining the system. If this were wholly true, there would be

little moral objection to it even if its constitutional necessity were questionable. The court, however, we believe, misapprehends the nature of the preliminary hearing and its value to attain minimum standards of due process.

The preliminary hearing, perhaps ideally, is employed to protect the defendant from oppressive and false prosecution and save both him and the public the expense and trauma of unnecessary trials. The formal conception of the preliminary hearing is that of a sort of minitrial wherein the prosecutor puts on at least the bulk of his case, the defendant counters with his defense, counsel debate the merits, and the judge determines whether the facts warrant the attention of a jury. The reality is a hearing more in the form of an *ex parte* proceeding with the defendant present. *Prosecution: The Decision to Charge a Suspect with a Crime.* Frank W. Miller, at 64-65.[1]

There are apparently a number of reasons for this, such as the unavailability in some places of counsel for indigents at the preliminary hearing, the objective of each party to avoid revealing their case to the other side, and the tendency of magistrates to give a cursory review of the evidence and rely on the prosecutor to make the correct charging

[1] *Prosecution: The Decision to Charge a Suspect with a Crime*, by Frank W. Miller, was published as the last volume in the report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. The book is among the most thorough of materials dealing with the nature of the prosecutor's function and contains much information and insight into the preliminary hearing of a procedural device.

decision and on the trial court to finally sift the evidence. In addition, a preliminary hearing can be disadvantageous to the defense by setting porsecution witnesses in their testimony, solidifying the allegiance of the prosecutor's witnesses, increasing adverse publicity, and preserving adverse witnesses' testimony. Miller, at 46. Given the general real nature of preliminary hearings, it is appropriate to ask whether the preliminary hearing is a sufficiently useful evidence screening device as to make its availability a matter of constitutional imperative.

The typical approach by the prosecutor to a preliminary hearing, as observed by Miller, is to put on as little evidence as he feels is necessary to get a bind-over decision. Normally, this is accomplished through the testimony of one or two witnesses, usually the arresting officer and perhaps some sort of expert testimony. The prosecutor wants to give as little of his case to the defendant who in turn, even when represented by counsel, will seldom offer any rebuttal evidence preferring to save his ammunition for the jury. The result of this policy is that occasionally cases are dismissed or bound over when they should not be. This does not mean that the evidence available would actually be insufficient to provide probable cause to charge or that there is an affirmative defense, but simply that enough has not been offered. Miller, at 67-69. To some extent then, the committing magistrate and the preliminary hearing become a ritual to be observed: by the prosecutor,

because he needs the ruling to continue his prosecution, and by the defense who want to get as much insight into the state's case as possible without revealing their own line of defense. In addition, both deputy prosecutors and defense attorneys normally enter preliminary hearings having had too little time to investigate and prepare for a useful adversary probing of the issues. Part of the reasons defendants make no serious efforts to obtain a dismissal in most cases is their reliance on the thorough screening of the prosecutor prior to the preliminary examination to eliminate the weak cases. Miller at 76. If there is conscientious case screening by the prosecutor and indeed police officials, there is little need for further screening by a magistrate. The number of cases dismissed at preliminary hearings is quite low—probably an average dismissal rate of about two percent of all persons entitled to preliminary hearings which includes those who waive the preliminary hearing. Miller at 84.[2] Mr. Miller's study demonstrates that at least in Kansas, Michigan, and

[2] "In Wisconsin, less than 10 percent of the defendants given preliminary examinations are dismissed. In Kansas, a comparable dismissal rate prevails. In Michigan, statistics from Recorder's Court indicate that 17 percent are dismissed, but personnel in the Detroit prosecutor's office believe that 5 percent is a more accurate figure. In each of the three states, then, a very small percentage of defendants given preliminaries is dismissed.

"The dismissal rate at the preliminary drops even lower when waivers are considered. Thus, in Kansas, 66 percent of the defendants eligible for preliminaries waive them; in Wisconsin statistics indicate, with some doubt surrounding them, that 90 percent waive; in Michigan, 72 percent waive. When dismissals are considered in relation to all cases in which preliminaries are authorized by law, the dismissal rate in Kansas drops to 3 percent, in Michigan to 1.4 or 4.75 percent (depending upon which dismissal rate figures are used), and in Wisconsin to 1 percent. An average dismissal rate of 2 percent of all persons entitled to preliminaries is probably a substantially accurate reflection of current practice."

Wisconsin, an intensive prosecutor screening process effectively eliminates weak cases. It may be argued that the screening Miller observed was as intense as it was because of the existence of the preliminary hearing as a check and incentive to the prosecutor. This is a plausible argument, but in fact the preliminary hearing does not always have this salubrious effect. For example, at least in the recent past, the Cook County, Illinois, prosecutor's office tended to rely on the preliminary hearing as a screening device, anticipating the magistrate would play an active role in the hearing. The existence of such practice indicates that the effectiveness of the preliminary hearing as a screening device depends on the degree to which the prosecutor chooses to delegate charging decisions to the magistrate. Oaks and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. Ill. L.F. 584, at 625-627.

It does not follow that the existence of a preliminary hearing in a criminal action is of such significance to the rights and defense of the accused as to elevate the hearing to the level of a constitutional imperative. The workload borne by prosecutor's offices, particularly in our urban areas, encourages prosecutors to weed out weak cases and charge only in instances where the probability of conviction is high. Miller at 101. There are some indications that prosecutors are concerned about a good conviction record. This factor, to the extent it plays a part in

the decision to prosecute, together with the desire to avoid conviction of the innocent and mitigate the harshness of the law by applying a measure of human tolerance to the rigid letter of the law, and the workload and limited time and manpower resources of prosecutor offices all tend to encourage early and critical screening of criminal allegations and to encourage the application of a standard to the charging decision based on the probability of ultimate conviction rather than the less demanding standard of probable cause to believe that the defendant committed the crime. Miller at 342-343.

Mr. Miller has found in the course of his limited study that magistrates tend to apply one of three standards in deciding whether to bind over the defendant. They may see their function as solely to test the sufficiency of the evidence to go to the jury (whether a *prima facie* case has been established). Even if the defendant offers evidence of a plausible affirmative defense, the magistrate may choose not to invade the province of the jury. Or the judge may see his function as that of screening out unconvictable people, a standard normally adopted by prosecutors to govern their own charging decisions. Finally, the magistrate may bind the defendant over if a *prima facie* case is indicated, but advise dismissal if the defendant appears unconvictable. Miller at 93-94.

None of these standards sifts the cases more finely than the prosecutor's convictability standard.

Still, even if one accepts the proposition that prosecutors would normally fairly and expeditiously perform their screening function and that a subsequent preliminary hearing would add little toward just and due process, there still remains the possibility of wrongly motivated prosecutorial acts wherein the defendants are charged when there is little basis for invoking the criminal process. Is there, in these comparatively few situations, a justification for imposing a constitutional requirement for a preliminary hearing in all cases, felony and misdemeanor where confinement may result?

The preliminary hearing schedule adopted by the District and Court of Appeals below places tight time restrictions on filing the information and preparing for the hearing. One effect, we submit, is to substantially reduce the prosecutor's role in the decision to charge. He is more likely to file an information on the appearance that the defendant has committed a crime, put on the necessary quantum of evidence to get the magistrate to bind over the case, and then, at greater leisure and upon fuller investigation, determine whether he really wants to prosecute. If he does not file immediately, he may lose the opportunity to do so later if the putative defendant is no longer available. The effect arguably is to have persons charged and confined following the hearing who would otherwise not have been charged. But on the other hand, a less aggressive prosecutor would have the tendency to act more conservatively and

avoid charging suspects when he does not believe from the evidence initially available that he will be able ultimately to get a conviction. This could account for the reduction in the Dade County felony case load mentioned in the court of appeals opinion. *Pugh v. Rainwater*, 483 F.2d 778, 787 (1973). At any rate, it would be wrong to conclude from this sole statistic that a preliminary hearing is a *sine qua non* for due process and judicial economy.

Section 6.02 of the American Law Institute Model Code of Pre-Arrangement Procedure (1966) provides that the prosecutor shall be the party with primary responsibility for filing a complaint charging a person with an offense. See also Comment on § 6.02, ALI Model Code of Pre-Arraignment Procedure (1966).

The courts below were concerned about the remedies available to a defendant charged by information who wishes to challenge the legality of his detention. He has, of course, the same remedy as a defendant arrested without probable cause or who is held following a search without probable cause or who gives an inadmissible statement or confession. At trial or at a pre-trial hearing on procedural questions suppression of evidence and statements often results in dismissal. If the evidence on which the information is based is insufficient a defense motion to dismiss will be granted. In addition, in Washington, a recent case, *State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971), suggests that a defendant in a

case brought by information without a preliminary hearing may challenge the validity of the prosecutor's decision by a motion to dismiss the information. Although the Supreme Court of Washington did not find the facts to justify a dismissal in *Jefferson*, the opinion suggests that a proven abuse of the prosecutor's discretion in arbitrarily and capriciously filing an information constitutes a denial of due process or of equal protection warranting dismissal of the information. *Jefferson* at 80.

Another student of the function of the preliminary hearing and a former county prosecutor has observed:

> "Although the preliminary hearing theoretically can serve many important functions insuring the fair administration of criminal justice at the pre-trial stage, in practice it often fails to perform its functions well.
>
> "When held, the hearing often fails to serve as an effective evidentiary screen to weed out unfounded charges. There are many reasons for this. First of all, a large proportion of magistrates and justices of the peace who are supposed to make an informed 'judicial' determination of probable cause have had little or no formal legal training. Secondly, these judicial officers often have a heavy workload because they usually have jurisdiction to try most misdemeanor and all petty offense cases in addition to their power to process the preliminary stages of felony cases. The large volume of cases of all types processed by each magistrate, particularly in urban areas, is reflected in delay and inability

> to give more than cursory consideration to individual cases. * * *" Gary L. Anderson, *The Preliminary Hearing—Better Alternatives or more of the Same?*, 35 Mo.L. Rev. 281 (1970).

Professor Anderson recognizes the possibility that the preliminary hearing can be an effective "mechanism for determining the legality of detention." Anderson at 291. He argues, however, that the tendency has been to judicialize the preliminary hearing more and more until we are "confronted with at least a *de facto* 'two trial' criminal process," Anderson at 324, where the judge, prosecutor, and defense all take an active part in the preliminary hearing as an adversary encounter. This is a multi-purpose preliminary hearing that is supposed to serve as a discovery device, a mechanism for determining probable cause to arrest and detain, and probable cause to bind the defendant over for trial. In trying to accomplish too much, it does nothing well. Anderson at 297-300. He concludes in part:

> "However, in our increasingly urban society the numerous theoretical benefits of such a 'preliminary trial' would seldom be realized in practice. Again using past history as a guide, we would predict that 'assembly line preliminary trials' would be held in overloaded lower court systems. Even if there were a constitutional mandate to hold preliminary hearings, it is doubtful that society would willingly provide sufficient additional resources to permit development of an adequate 'two trial' criminal

process. Furthermore, considering the functional compromises that must be made in any attempt to improve a preliminary, adversary, multipurpose judicial hearing, it does not appear sensible in theory to 'judicialize' or to absolutely require the hearing—assuming that better and less costly alternative procedures could be made available."

This state, Washington, in its Rules of Court, already provides a discovery device in the context of an "omnibus hearing," and we do not believe that a preliminary hearing is unconstitutionally or practically required to pass on the correctness of the prosecutor's screening decisions for the reasons given. We believe that for the court to constitutionally require the adoption of the lower courts' plan by state courts would unnecessarily interfere with the state's criminal jurisdiction, would further institutionalize a process of little real value, and add significant real physical burdens on court mechanisms that may detract from, rather than enhance, the quality of justice.

IV

DUE PROCESS IS APPROACHED BY BALANCING COMPETING FACTORS

The quality by which due process in state courts will be enhanced by requiring preliminary hearings is so slight as to be offset by the heavy total costs of thus enlarging state criminal procedures.

In search for due process in a state's criminal

procedure, the Court will look beyond the forms to the substance of process and it will consider the whole course of the criminal proceedings and not merely a single step. *Frank v. Magnum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915). It is our view that to require as a matter of due process preliminary hearings in all cases where prosecution is by information, rather than improve the quality of justice, would create new frustrations and impediments to the timely adjudication of criminal matters. If this Court sustains the substance of the District Circuit Court rulings the impact upon criminal courts at least in this state would be dramatic. Every information filed for an offense carrying a jail sentence, be it felony or misdemeanor, would have to be followed by a preliminary hearing, requiring, it is reasonable to assume, a staggering augmentation in courtroom space, judge time, court personnel, both administrative and judicial, prosecutor staff and facilities, witness availability and cost to the public of supporting the expanded procedure. These factors, of course, do not constitute the sole yardstick by which constitutional innovations are measured. Still, these are factors that should weigh in the decision of the court, particularly when, as we assert, the availability of "fundamental fairness" is not threatened by present procedures. The difficulty of defining due process in quantitive terms indicates the elusive quality of that element of judicial mechanism. Its essence is best approached when we have fairly balanced competing interests within the mechanism. The Court must

weigh what is to be gained by requiring a preliminary hearing and the likelihood of gaining it against the cost of such a step.

The instant case presents a situation in which it can be seen that the quality of due process will be little advanced by sustaining the rulings of the courts below.

CONCLUSION

The standards of due process in criminal prosecutions are not compromised by a procedure initiated by a prosecutor's information without a preliminary hearing. The Court's past decisions on this question justify this view. The effectiveness of the information procedure, the perfunctory tendencies of preliminary hearings, and the substantial costs of imposing a requirement for preliminary hearings in confinement cases militate for rejection of respondents position. For these reasons we respectfully urge this court to reverse the decision of the Court of Appeals of the Fifth Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-477

In the Supreme Court of the United States

OCTOBER TERM, 1974

GERSTEIN,

Appellant,

v.

PUGH,

Appellee.

Appeal from the United States Court of Appeal, for the Fifth Circuit

ORIGINAL BRIEF AMICUS CURIAE FOR THE STATE OF LOUISIANA

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ORIGINAL BRIEF AMICUS CURIAE FOR THE STATE OF LOUISIANA

This brief amicus is presented on behalf of the State of Louisiana.

STATEMENT OF FACTS

This is a class action seeking relief for alleged deprivation of rights under the Fourth and Fourteenth Amendments. Plaintiffs were incarcerated upon information filed by the state attorney and held for trial without review by a committing magistrate of the probable cause for their arrest. The plaintiffs thus contend that they have been deprived of a con-

stitutional right to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offenses with which they are charged. The Fifth Circuit, 483 F.2d 778 (1973), agreed with the District Court that persons arrested pursuant to information filed by a state attorney were entitled to a preliminary hearing to determine probable cause for the arrest. The Court also held that misdemeanants were entitled to such a hearing unless they were out on bond or charged with violating a law carrying no possibility of pre-trial incarceration.

ARGUMENT

I.

SHOULD THE COURT INTERVENE IN A STATE COURT PROSECUTION ABSENT A SHOWING OF BAD-FAITH OR HARASSMENT ON THE PART OF THE INSTITUTING OFFICIALS?

Since the arrestees will be held in custody for trial it is urged that a hearing is necessary to prevent this pre-trial incarceration without a determination of probable cause before a neutral magistrate. Abstention has been held inapplicable because it is not the *pending prosecution* which is being attacked but the detention prior to prosecution. It is argued that inadequate procedural determination was made of the basis for this detention, i.e. the probable cause that the arrestee committed the offense. The state

feels that this procedural by-pass of the traditional respect of this Court for non-intervention in the legitimate activities of the States has been too easily dismissed.

This Court has traditionally refused to give equitable relief by interfering with the enforcement of criminal laws by the states. Although the practice has not been declared an absolute rule, in order to effect a departure it is necessary to show irreparable injury. *Douglas v. City of Jeanette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943), at 164.

The judicial exception to the written provisions of the Anti-Injunction Statute, 28 USCA §2283, notes also the requirement that the individual about to be prosecuted in a State Court show that he will, if the State Court proceeding is not enjoined, suffer irreparable damages. *Younger v. Harris*, 91 S. Ct. 746, 401 U.S. 37, 27 L. Ed. 2d 669, (1971) at 750, citing *Ex Parte Young*. The requirement is that the injury be not only irreparable, but "both great and immediate". *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L. Ed. 927 (1926). Further the threat to plaintiff's federal rights must be one which cannot be eliminated by his defense of a single criminal prosecution. *Ex Parte Young*, supra, *Younger v. Harris*, supra. The situation in the present case is similar to that of *Douglas v. City of Jeanette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943) at 164:

> "It does not appear from the record that petitioners have been threatened with any injury

other than that incidental to every criminal proceeding brought lawfully and in good faith."

The special circumstances of *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed 2d 22 (1965), are not present in this case. In that instance the Court dealt with the particular injury, recognized as irreparable, above and beyond that associated with the defense of a single prosecution brought in good faith, regarding the substantial rights of freedom of expression and their suppression. In the case at bar, there is no contention in the Fifth Circuit decision that the prosecutions were brought in bad faith or to harass the individuals confined. Here the injury is solely "that incidental to every criminal proceeding brought lawfully and in good faith". *Douglas*, supra.

The Court has stated the proposition that if injunctive relief is inappropriate due to the absence of showing irreparable injury, declaratory relief ordinarily would not be proper to declare the state statute unconstitutional. *Samuels v. Mackell*, 91 S. Ct. 764, 401 U.S. 66, 27 L. Ed. 2d 688 (1971). *Becker v. Thompson*, 459 F. 2d 919 (5 Cir. 1972), cert. gr., sub nom *Steffel v. Thompson*, 410 U.S. 593, 93 S. Ct. 1424, 35 L. Ed. 2d 686 (1973). Therefore, where the state statutes involved are not applied in bad faith or to harass the defendants, and where there is an absence of a showing of irreparable injury to defendants, this Court has traditionally refused to intervene in a State Court criminal proceeding to declare such statutes unconstitutional, and such intervention should not be made in the case at bar.

II.

IS IT A CONSTITUTIONALLY MANDATED DUE PROCESS RIGHT FOR AN ARRESTEE IN CUSTODY TO BE AVAILED A PRELIMINARY HEARING BEFORE A NEUTRAL MAGISTRATE FOR A DETERMINATION OF PROBABLE CAUSE FOR ARREST, AFTER THE FILING OF AN INFORMATION BY A DISTRICT ATTORNEY?

The right as defined by *Pugh v. Rainwater*, would entitle all persons arrested pursuant to informations filed by a state attorney a hearing before a neutral magistrate to determine probable cause for the arrest. Misdemeanants would also be entitled to such a hearing unless they were out on bond or charged with violating a law carrying no possibility of pre-trial incarceration.

The state contends that this determination of probable cause before a neutral magistrate is not constitutionally mandated by the Fourth and Fourteenth Amendments to the Constitution of the United States. This Court has repeatedly held that the preliminary examination is not constitutionally mandated. "A preliminary examination is unknown to the common law and an accused is not entitled to such an examination, unless it is given him by constitutional or statutory provision." *Pearce v. Cox*, 354 F. 2d 884, 891; cert den. 86 S. Ct. 1869, 1871; 384 U.S. 976, 977; 16 L. Ed. 2d 685, 686. See also *Goldsby v. U.S.*, 160 U.S. 70, 16 S. Ct. 216, 40 L. Ed. 343 (1895), *Green v. Bomar*, 329 F.

2d 796 (6th Cir. 1964), *Corbett v. Patterson*, 272 F. Supp. 602 (1967), *People v. McCrea*, 6 N. W. 2d 489, 303 Mich. 213, cert. den. 63 S. Ct. 851, 318 U.S. 783, 87 L. Ed. 1150 (1942).

In discussing the necessity of a pre-trial conference prior to indictment in tax cases the Court in *U. S. v. Goldstein*, after dismissing an equal protection argument, stated: "Nor can it be asserted that a taxpayer is denied due process by the absence of a pre-indictment conference, *for his rights at trial will be fully protected.*" 342 F. Supp. 661, 666, (1972), emphasis supplied. And "Furthermore, the law is well settled that the due-process clauses of the Federal and State Constitutions do not require a preliminary examination in criminal proceedings." *People v. McCrea*, supra, at 502, and numerous cases cited therein, *Miller v. Anderson*, 352 F. Supp. 1263.

III.

IF THE COURT SHOULD DECLARE THE RULE ANNOUNCED IN *PUGH V. RAINWATER* TO BE CONSTITUTIONALLY MANDATED, THE APPLICATION OF THE DECREE SHOULD BE PROSPECTIVE ONLY.

The considerations for applying decisions expounding new constitutional rules affecting criminal trials retroactively or non-retroactively were established in *Linkletter v. Walker*, 381 U.S. 618, 629; 85 S. Ct. 1731, 1737; 14 L. Ed. 2d 60 and most recently summarized in *Stovall v. Denno*, 388 U.S. 293, 297; 87

S. Ct. 1967, 1970; 18 L. Ed. 2d. 1199, "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard."

There is strong support for prospectivity for a decision amplifying the requirements for a determination of probable cause before a neutral magistrate. The purpose here is to prevent a pretrial incarceration without first having a hearing before a neutral magistrate. The incarcerations in cases already prosecuted are now ended and there will be no purpose served in releasing convicted individuals who have received a full and fair trial and have been determined guilty prior to their present incarceration.

The preliminary hearing to determine probable cause is similar in purpose to that of the exclusionary rule, which is but a "procedural weapon that has no bearing on guilt" and, as in this case, "the fairness of the trial is not under attack". *Linkletter v. Walker*, supra, which gave the exclusionary rule only prospective application.

The purpose of the rule presently propounded is easily distinguished from that in *Adams v. Illinois*, 405 U.S. 278, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1971), a situation where the "major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding func-

tion and so raises serious questions about the accuracy of guilty verdicts in past trials," as discussed in *Williams v. U. S.*, 401 U.S. 646, 653; 91 S. Ct. 1148, 1152; 28 L. Ed. 2d 388 (1971).

The decisions which have been given retroactive effect[1] have been based on the possibility of "unreliability or coercion". *Linkletter v. Walker*, supra.

The second consideration in determining retroactivity concerns the reliance by authorities on the old standards and the extent to which the new requirements were foreshadowed in the decisions of this Court. As illustrated by the numerous citations in the second argument, the rule presently considered was not intimated by prior decisions of this Court. *Desist v. U. S.*, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969).

In considering the third requirement of *Linkletter*, supra, the effect on the administration of justice by retroactive application of the new standard would be substantial. It is to be noted that these latter two requirements have not been relied upon except where the purpose of the rule announced has not clearly favored either retroactivity or prospectivity. *De Stefano v. Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308; *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199; *Johnson v. New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

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[1] *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799; *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, *Cottle v. Wainwright*, 477 F. 2d 269 (1973).

The present decision should be implemented only with respect to its purported purpose and thus made applicable only to those prosecutions commenced without a preliminary hearing after the date of the original decision of *Pugh v. Rainwater*, *Stovall v. Denno*, supra.

CONCLUSION

The State of Louisiana respectfully requests that the Court hold for the appellant herein, for the aforementioned reasons.

Respectfully submitted,

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CERTIFICATE

I hereby certify that copies of the foregoing Original Brief Amicus Curiae For The State Of Louisiana have this date been served on Counsel of record for Appellant and Appellee by mailing same in the United States Mail, postage prepaid.

Baton Rouge, Louisiana, this 21st day of August, 1974.

WALTER L. SMITH, JR.,

B-4796, 8-74

Supreme Court, U. S.
FILED
AUG 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD GERSTEIN,

Appellant,

vs.

ROBERT PUGH,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATE OF NEW JERSEY *AMICUS CURIAE*

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

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OCTOBER TERM, 1974

No. 73-477

RICHARD GERSTEIN,

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vs.

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Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

MOTION TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of New Jersey respectfully moves for leave to file out of time the within brief, *amicus curiae* in this case.

The *amicus* has a special interest in the disposition of the case in that the validity of its procedures before trial

may be affected by the court's determination of the merits. For this reason the *amicus* respectfully requests this Court to grant its motion to file this brief out of time.

Respectfully submitted,

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By: HOWARD E. DRUCKS,
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Dated: August 13, 1974.

Statement of Interest of the *Amicus Curiae*

The United States Supreme Court has recently heard argument addressed to the constitutional propriety of a Florida criminal procedure permitting the incarceration of a defendant when a prosecuting attorney files an information certifying the existence of probable cause. *Florida Statutes* 904.01. The United States Court of Appeals for the Fifth Circuit has held that such incarceration is unconstitutionally founded, mandating the timely determination of probable cause in a formal preliminary hearing. *Pugh* v. *Rainwater*, 483 F. 2d 778 (5 Cir. 1973). Unlike Florida, New Jersey Court Rules do not permit the predication of pre-trial incarceration on the exclusive authority of the prosecutor's imprimatur. The Supreme Court's determination of the constitutional quality and source of a sanction for such incarceration does raise, however, the issue of the validity of the relevant New Jersey practice thus warranting submission of this *amicus* brief asserting its procedural sufficiency. The *Rules Governing The Courts of the State of New Jersey* establish the following prescriptions governing procedure following arrest:

> "If the complaint charges the defendant with an indictable offense, the court shall inform him of his right to have a hearing as to probable cause and of his right to indictment by the grand jury. . . ." Rule 3:4-2.

and

> "If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, the court shall hear the evidence offered by the State within a rea-

sonable time and the defendant may cross-examine witnesses against him." Rule 3:4-4.

New Jersey Courts, citing to these rules, have held that the issuance of an indictment by a grand jury establishes probable cause, thus obviating the need for a preliminary hearing. *State* v. *Boykin*, 113 N. J. Super. 594 (L. Div. 1971); *United States* v. *Conway*, 415 F. 2d 158 (3 Cir. 1969), *cert. den.* 397 U. S. 994 (1969). The State of New Jersey respectfully submits that this proposition is constitutionally correct.

ARGUMENT

POINT I

The issuance of an indictment by a Grand Jury obviates the constitutional need for a formal judicial determination of probable cause.

The gravamen of the Court of Appeal's objection to the Florida practice was the unseemly "entanglement between the prosecutorial and judicial functions . . ." *Id.* at 787. The reviewing court did state that "[i]ncarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis for this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing." *Id.* at 787. It is respectfully submitted that the *Pugh* court's reference to judicial scrutiny should be accorded a generic signification, *i.e.* any examination judicial in nature, although not necessarily conducted by a judicial officer, is a constitutionally satisfactory mode of determining probable cause. Thus, even within the parameters established by the *Pugh* court, the New Jersey practice is permissible.

It should be noted that in *Ocampo* v. *United States*, 234 U. S. 91 (1914), cited by the *Pugh* court, the Supreme Court, in dictum, observed that a determination of probable cause is not categorically a judicial act:

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest.
>
> • • •
>
> *"In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal."* *Id.* at 100-01 (emphasis provided).

The *Pugh* court correctly noted that *Ocampo* dealt with a pre-arrest probable cause hearing, as distinguished from a post-arrest situation when "the State already has the defendant in custody [and] is not in jeopardy of losing him before a magistrate can rule on probable cause." *Pugh, supra* at 784. The court then held that the prosecuting attorney in that context, irrespective of the dictum in *Ocampo*, was not sufficiently detached to initiate the criminal process through a certification of probable cause.

The State of New Jersey would disagree with the holding of the *Pugh* court to the extent it may be read to man-

date a formal judicial hearing as the exclusive mode for determining probable cause. Although *Ocampo* may not be precedentially binding as to the permissibility of the prosecutor's certification, its language bearing on the quasi-judicial character of the process of determining probable cause is apropos to a constitutional review of the New Jersey practice. As noted above, the *Pugh* court was disturbed by what it deemed an inappropriate arrogation by the prosecutor of a judicial function. Yet, as observed by the *Ocampo* court, the determination of probable cause is not a strictly judicial act. Although the *Pugh* court was concerned with the classic jurisprudential problem of prosecutorial encroachment upon the judicial province, the real focus of the court's attention was the effect upon the integrity of the prosecutorial function by assimilation of what is an essentially non-prosecutorial task. Consequently the *Pugh* court's solicitude for the Supreme Court's pointed references in *McNabb* v. *United States,* 318 U. S. 322 (1942), to "disinterestedness in law enforcement" and in *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1970), to the difficulty encountered by prosecutors and policemen in maintaining neutrality while participating in the "competitive enterprise" of law enforcement is readily understandable. Prosecutorial integrity in substance and appearance is obviously unimpaired when the obligation of determining probable cause is reposed in a non-prosecutorial, albeit not formally judicial, entity.

In *Shadwick* v. *Tampa,* 407 U. S. 345 (1971), for example, the Supreme Court held that clerks of the Municipal Court were competent to issue arrest warrants. The crucial determinants of the constitutionality of this practice were the detachment and neutrality of the issuing officers, to wit, their dissociation from the prosecutorial function:

> "The requisite detachment is present in the case at hand. Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires." *Id.* at 351. Compare *Coolidge* v. *New Hampshire, supra.*

Identical institutional attributes are exhibited by the grand jury. In New Jersey the institution has been traditionally regarded as manifesting a judicial character:

> "The question reduces itself to whether the grand jury is part of the court. Of this it seems there is no doubt. In *In re Schwartz,* 133 N. J. L. 79, 84-85 (Sup. Ct. 1945), reversed on other grounds, 134 N. J. L. 267 (E. & A. 1946), the court of last resort approved the expression of the law 'that the grand jury is an arm of the court, and that contempts in the presence of the grand jury are to be treated as taking place in the presence of the court.'" *State* v. *Haines,* 18 N. J. 550, 557 (1955).

The *Haines* court also cited the following pertinent language from *O'Regan* v. *Schermerhorn,* 25 N. J. Misc. 1, 19-20 (Sup. Ct. 1946): "The grand jury, at common law, is an arm of the court and acts for the court under which it is organized, and its proceedings are regarded as proceedings in the court. * * * Its members are officers of the court and *exercise functions of a judicial nature* and its proceedings are judicial." (emphasis provided). That the

grand jury possesses the requisite qualities of fairness and disinterest to fairly discharge these functions has been recognized by the Supreme Court. *Branzburg* v. *Hayes*, 408 U. S. 665, 688 (1972); *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962); *Costello* v. *United States*, 350 U. S. 359, 362 (1956). Consequently it is not surprising that many federal courts have held that the issuance of an indictment renders a preliminary hearing unnecessary. As noted in *United States* v. *Mackey*, 474 F. 2d 55 (4 Cir. 1973), *cert.* den. 83 S. Ct. 2782 (1973):

> "[Defendants] have failed to advance any arguments which persuade us to reconsider our long-standing rule that the return of an indictment by the grand jury eliminates the requirement of holding a preliminary hearing. The purpose of both is to insure the existence of probable cause before an accused is brought to trial. That purpose is fully effectuated by either." *Id.* at 56.

See also *United States* v. *Anderson*, 481 F. 2d 685, 691 (4 Cir. 1973); *United States* v. *Daras*, 461 F. 2d 1361 (9 Cir. 1972), *cert.* den. 409 U. S. 1046 (1972); *United States* v. *Le Pera*, 443 F. 2d 810 (9 Cir. 1971), *cert.* den. 404 U. S. 958 (1971); *United States* v. *Lewis*, 443 F. 2d 1146 (D. C. Cir. 1970); *Clemons* v. *United States*, 408 F. 2d 1230 (D. C. Cir. 1968), *cert.* den. 394 U. S. 964 (1968); *Woods* v. *State of Texas*, 404 F. 2d 332 (5 Cir. 1968); *Bayless* v. *United States*, 381 F. 2d 67 (9 Cir. 1967); *Rivera* v. *Government of Virgin Islands*, 375 F. 2d 988 (3 Cir. 1967).

It is true that certain District of Columbia Circuit decisions have imputed an indispensible discovery function to the preliminary hearing, to wit:

> "We have recognized that the preliminary hearing is an important right of an accused affording him '(1) an opportunity to establish that there is no probable cause for his continued detention • • • and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.' [citations omitted]. . . . Moreover, we have held that the right to a preliminary hearing, if timely asserted, is not forfeited solely by the later return of an indictment." *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967).

See also *Holmes* v. *United States*, 370 F. 2d 209 (D. C. Cir. 1966); *Crump* v. *Anderson*, 352 F. 2d 649 (D. C. Cir. 1965); *Blue* v. *United States*, 342 F. 2d 894 (D. C. Cir. 1965), *cert.* den. 380 U. S. 944 (1965).

That a defendant is incidentally benefitted by his exposure to part of the triable State's case at the preliminary hearing is conceded. Yet other courts have held this minimal advantage to be an insufficient basis for the enunciation of a generalized right to such a hearing:

> "'Petitioner relies on the recent decision of the Court of Appeals for District of Columbia Circuit in *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967).
>
> • • •
>
> We cannot agree to elevating into a right to be enjoyed by an accused the pure fortuity that where a preliminary hearing is held there is necessarily some discovery of the government's evidence. It is quite clear from the logic as well as the history of the procedure that discovery is *not* one of its purposes." *Sciortino* v. *Zampano*, 385 F. 2d 132 (2 Cir. 1967), *cert.* den. 390 U. S. 960 (1968).*

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* New Jersey Rules provide for ample discovery by a defendant of the State's case. See Rule 3:13-3(a) appended to this brief.

See also *United States* v. *Amabile,* 395 F. 2d 47, 53-54 (7 Cir. 1968); *Swingle* v. *United States,* 389 F. 2d 220, 223 (10 Cir. 1968), *cert.* den. 392 U. S. 928 (1968); *Spinelli* v. *United States,* 382 F. 2d 871, 887 (8 Cir. 1967), reversed on other grounds, 383 U. S. 410 (1969); *Bayless* v. *United States, supra; United States* v. *Chase,* 372 F. 2d 453, 467 (4 Cir. 1967), *cert.* den. 387 U. S. 907 (1967); *United States* v. *Smith,* 357 F. 2d 318, 320 (6 Cir. 1966).

In sum, New Jersey, in contradistinction to the practice in Florida, provides a constitutional *quid pro quo* for a formal judicial determination of probable cause. The conceptual task of determining probable cause has been characterized as being only a quasi-judicial function. Consequently the grand jury, an entity partaking of the judicial character, although not composed of formal judicial officers, is a constitutionally appropriate substitute for a formal judicial hearing.

CONCLUSION

For the reasons expressed herein the *amicus* respectfully submits that the issuance of an indictment obviates the constitutional need for a preliminary hearing.

Respectfully submitted,

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APPENDIX

3:13-3. Discovery and Inspection

(a) Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant

(1) books, tangible objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecuting attorney;

(5) reports or records of prior convictions of the defendant;

(6) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the State;

(7) names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he may call as witnesses;

(8) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior conviction of such persons;

(9) police reports which are within the possession, custody, or control of the prosecuting attorney;

(10) warrants, which have been completely executed, and the papers accompanying them including the affidavits, transcripts or summary of any oral testimony, return and inventory.

FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, FLORIDA,

Petitioner

V.

ROBERT PUGH AND NATHANIEL HENDERSON, ON THEIR BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND THOMAS TURNER AND GARY FAULK ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, STATE ATTORNEY
FOR THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR DADE
COUNTY, FLORIDA,

Petitioner

V.

ROBERT PUGH AND NATHANIEL HENDERSON,
ON THEIR BEHALF AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,
AND
THOMAS TURNER AND GARY FAULK ON THEIR
OWN BEHALF AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

PRELIMINARY STATEMENT

NOW COMES the State of Texas, by and through its Attorney General, John L. Hill, having been invited by the Court to file a brief as amicus curiae in the above entitled and numbered cause and files this its brief as amicus curiae.

The State of Texas has an interest in the subject matter involved in this litigation for the reason that the resulting decisions of this Court may well effect the pre-trial commitment of persons charged with offenses, particularly misdemeanors, pursuant to currently effective provisions of the Texas Code of Criminal Procedure.

OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Florida is reported at 332 F. Supp. 1107 (Southern Dist. of Florida 1971). The order adopting a plan to implement the original opinion is reported at 336 F. Supp. 490 (Southern Dist. of Florida, 1972). The District Court findings, requested by the Court of Appeals after oral argument are reported at 335 F. Supp. 1286 (Southern Dist. of Florida 1973). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 483 F. 2d 778 (5th Cir. 1973).

QUESTIONS PRESENTED

DO THE 4TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES REQUIRE THAT A STATE MUST GIVE DEFENDANTS CHARGED IN STATE COURT PURSUANT TO THE FILING OF AN INFORMATION BY A STATE ATTORNEY A PRELIMINARY HEARING TO DETERMINE PROBABLE CAUSE FOR THEIR ARREST?

STATUTORY PROVISIONS INVOLVED

Articles 2.09, 11.01, 11.05, 11.08, 11.09, 11.11, 11.40, 14.01, 14.06, 15.01, 15.04, 15.16, 15.17, 16.01, 16.07, 16.08, 16.17, 21.01, 21.20, 21.21, 21.22, and 23.01 of the Texas Code of Criminal Procedure. These articles are set forth in the Appendix hereto.

ARUGUMENT AND AUTHORITIES

It is the position of the State of Texas that a review of the Articles of the Texas Code of Criminal Procedure quoted in the Appendix hereto will demonstrate that all of the due process requirements of *Pugh v. Rainwater*, 483 F. 2d 778 (5th Cir. 1973) are met by the statutory provisions governing pre-trial confinement, preliminary hearings, and indictments. The Texas statutes authorize the arrest of an individual either with or without a warrant. Before a magistrate may issue a warrant of arrest, a sworn complaint must be made before him, showing probable cause. Misdemeanors are normally prosecuted with the filing of a complaint with the district or county attorney, who subsequently files an information with the court having jurisdiction, resulting in the issuance of a capias for the arrest of the accused.

Whether arrested with or without a warrant, the arrestee must be taken before a magistrate "without unnecessary delay". The magistrate is then required to admonish the arrestee of his rights including the right to an examining trial.

After being so admonished, the accused may either request than an examining trial be held, or waive his right to such proceeding.

The purpose of holding an examining trial is to allow the magistrate to inquire into the truth of the accusation and determine if probable cause exists for the continued holding of the accused. The defendant must be present during the hearing, and after a review of the evidence produced, the magistrate may either commit the defendant to jail, discharge him, or allow him to post bail. Furthermore, it is also provided by the statute that if the magistrate does not make an order within 48 hours after completion of the examining trial, his inaction operates as a finding of no probable cause and the accused must be discharged.

Ultimately, no person may be brought to trial on a felony accusation without the return of an indictment by a grand jury, whereas misdemeanor offenses can be brought to trial based on either an indictment, or information filed by the district or county attorney. Furthermore, once an indictment has been returned, the accused loses his right to an examining trial, as the issuance of the indictment reflects a determination by the grand jury of the existence of probable cause. Without conceding that the Court of Appeals for the Fifth Circuit has correctly construed the requirements of due process mandated by the Fourth and Fourteenth Amendments of the Constitution of the United States in *Pugh v. Rainwater,* supra, it appears that the Texas

procedure outlined in the statutes contained in the Appendix already provide for a determination of probable cause through an examining trial if the arrestee should request such an examining trial. This is particularly true of a person who is arrested and charged with a felony. The Texas Court of Criminal Appeals described the function of the examining trial in *Harris v. State,* 457 S. W. 2d 903 (Tex. Crim. App. 1970):

> "Though the preliminary hearing provided for in Article 16.01, V. A. C. C. P., may be a practical tool for discovery by the defendant, the primary justification for its existence is to protect the innocent defendant from incarceration on a totally baseless accusation. Therefore, before the accused may be held for grand jury action, our statutes require the prosecution to justify his incarceration by proving in an examining trial before a magistrate that there is probable cause to believe the accused committed the offense charged."

In the same case the Texas Court of Criminal Appeals goes on to say:

> "If the grand jury returns a true bill prior to the time that an examining trial is held, the principle purpose and justification of such hearing has been satisfied. See *Vincent v. United States,* 337 F. 2d 891 (8th Cir.), cert. den. 380 U. S. 988, 85 S. Ct. 1363 14 L. Ed. 2d 281. Action by a grand jury in returning the indictment supersedes the complaint procedure and eliminates the necessity of an examining trial. *Jaben v. United States,* 381 U. S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345; *State v. Wiggleworth,* 18 Ohio St. 2d 171, 248 N. E. 2d 607."

Furthermore, the Respondent in the instant case does not contend that a probable cause hearing is required after indictment. Page 2 of Respondents' Brief.

The arrest and detention of a person accused of committing a misdemeanor in the State of Texas presents a somewhat different matter. A reading of Article 16.01, V. A. C. C. P., would seem to indicate that an examining trial is available to every person charged with an offense whether it be of the grade of felony or misdemeanor. The Texas Court of Criminal Appeals however has concluded otherwise in *Ex Parte Clark*, 417 S. W. 2d 402 (Tex. Crim. App. 1967). In this case the Court said:

> "We do not construe Article 16.01 of the 1965 Code as guaranteeing to an accused the right to an examining trial in a misdemeanor case. See: *Ex Parte Way*, 48 Tex. Crim. Reports, 584, 89 S. W. 1075, wherein it was held that under the 1925 Code there was no necessity for an examining trial in a misdemeanor case. Further, there is no showing that Appellant requested or was denied an examining trial."

From the foregoing quoted language it is impossible to predict what the Texas Court of Criminal Appeals would hold in the event that an examining trial in a misdemeanor case was requested by the accused. Furthermore, the above quoted language was recited by the courts prior to the decisions in this Court which emphasized the importance of providing a probable cause hearing to satisfy due process requirements.

Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, (1972); *Chadwick v. Pampa*, 407 U. S. 345, 92 S. Ct. 2119, (1972); *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); and *Stanley v. Illinois*, 405 U. S. 645, 92 S. Ct. 1208 (1972).

On the other hand, if the Texas Court of Criminal Appeals should continue to adhere to the position taken in *Clark*, supra, a person charged with a misdemeanor in Texas could very well continue to be held in confinement without the availability of the examining trial provided for in Article 16.01, V. A. C. C. P., or the preliminary hearing mandated by *Pugh v. Rainwater*, supra.

In this posture then does the failure to accord to each person charged with a misdemeanor an automatic preliminary hearing or examining trial amount to a deprivation of due process? The State of Texas submits that the answer to this question should be in the negative for two reasons:

1) That in the case of each person who is confined pursuant to a warrant of arrest issued after being charged with a misdemeanor may challenge his incarceration by way of writ of habeas corpus pursuant to the provision of Article 11.09, V. A. C. C. P.
2) That the contentions of the Respondent are in reality a challenge upon the fact of confinement and should therefore be disposed of by a writ of

habeas corpus rather than by bringing an action under the Civil Rights Act, 42 U. S. C. A. § 1983.

From a reading of Articles 11.09 and 11.40, V. A. C. C. P., it is apparent that a person charged with a misdemeanor in Texas is entitled to test the validity of his pre-trial confinement by an application for writ of habeas corpus. In the instant case in arguing before this Court, counsel for the Respondent admitted that if he had the writ of habeas corpus available to him he would not be before the Court. On the other hand, they argued that the person confined must not only have some remedy but he must also have it provided to him by the State automatically. At another point in his argument he contended that he was not contesting the fact of confinement but that he was seeking only a hearing before the magistrate to determine probable cause. It seems absurd to say that you are not seeking release from confinement while at the same time demanding a hearing before a magistrate to determine probable cause for continued retention. It is submitted that this argument was fashioned by Respondent in order to avoid the consequences of *Preiser v. Rodriguez*, ___ U. S. ___, 93 S. ct., 1827 (1973).

In *Preiser v. Rodriguez*, this Court held:

> "Upon that question, we hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the release he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus."

It seems clear that in demanding a due process hearing for a determination of probable cause, Respondent is in essence seeking to challenge the very fact of his confinement. What other purpose could be served by a determination of probable cause at that juncture? The answer and the only answer is that he is seeking his release from confinement and that his remedy is therefore by writ of habeas corpus. If in fact there is no viable opportunity for a writ of habeas corpus in the State of Florida the remedy of Respondent is to petition by way of *federal* habeas corpus alleging the absence of such a remedy in the state court for the assumption of jurisdiction by the federal court. This it seems is the clear meaning of *Preiser v. Rodriguez*. In the State of Texas there is available to a pre-trial detainee the opportunity to bring a writ of habeas corpus and therefore the rationale of *Preiser v. Rodriguez*, would demand that he exhaust his remedies in the state court prior to seeking relief in the federal courts.

To entertain this suit as a civil rights suit and to grant the relief sought by Respondent in the instant case, will be to have the Supreme Court to prescribe the Code of Ciminal Procedure for various states. This avenue was specifically rejected by this Court in *Morrissey v. Brewer*, supra, wherein it was said:

> "We cannot write a Code of Procedure; that is the responsibility of each state. Most states have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of the due process."

The quoted portion of the decision in *Morrissey v. Brewer* concerns itself with the due process requirements of parole revocation proceedings. It is significant that the due process requirements of *Morrissey v. Brewer* were raised by way of habeas corpus. In *Preiser v. Rodriguez* this Court cites a wide variety of challenges to confinement as being properly raised by way of habeas corpus:

> "Thus, whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional, as in *Ex parte Siebold*, supra; that he has been imprisoned prior to trial on account of a defective indictment against him, as in *Ex parte Royall*, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 868 (1886); think he is unlawfully confined in the wrong institution, as in *re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149 (1894), and *Humphrey v. Cady*, 405 U. S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972); that he was denied his constitutional rights at trial, as in *Johnson v. Zerbst*, supra; that his guilty plea was invalid as in *Von Moltke v. Gilies*, 332 U. S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948); that he is being unlawfully detained by the Executive or the military, as in *Parisi v. Davidson*, 405 U. S. 34 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972); or that his parole was unlawfully revoked causing him to be recarcerated in prison, as in *Morrissey v. Brewer*, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) - in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement."

It is respectfully submitted that all challenges to pre-trial commitment procedures should be raised by

writs of habeas corpus according to the rationale of *Preiser v. Rodriguez*. The decision of the Court of Appeals for the Fifth Circuit should be reversed for the reason that it has utilized the wrong vehicle, 42 U. S. C. A. 1983, in attempting to impose its view of due process requirements upon the individual states.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to reverse the judgment of the Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

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Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Max P. Flusche, Jr., Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Brief of the State of Texas as Amicus Curiae has been deposited in the United States Mail, postage prepaid, certified, on this the _____ day of August, 1974 to the following addresses: Mr. Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, Mr. Phillip A. Hubbart, Esquire, Metropolitan Justice Building, 1351 N. W. 12 Street, Miami, Florida, Mr. Peter L. Nimkoff, Esquire, Suite 607, Ainsley Building, 14 N. E. First Avenue, Miami, Florida, Mr. Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, and Mr. George R. Georgieff, Assistant Attorney General of Florida, The Capitol Building, Tallahassee, Florida 32304.

MAX P. FLUSCHE, JR.
Assistant Attorney General

APPENDIX

Article 2.09 - Who Are Magistrates:

Each of the following officers is a magistrate within the meaning of this Code; the judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Courts, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

Article 11.01 - What Writ Is:

The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

Article 11.05 - By Whom Writ May Be Granted:

The Court of Criminal Appeals, the District Court, the County Court, or any judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by the law.

Article 11.08 - Applicant Charged with Felony:

If a person is confined after indictment on a charge of felony, he may apply to the judge of the court, in which he is indicted; or if there be no judge within the district, then to the judge of any district whose residence is nearest to the courthouse of the county in which the applicant is in custody.

Article 11.09 - Applicant Charged with Misdemeanor:

If a person is confined on a charge of misdemeanor, he may apply to the County judge of the county in which the misdemeanor is charged to have been committed, or if there be no county judge in said county, then to the county judge whose residence is nearest to the courthouse of the county in which the applicant is held in custody.

Article 11.11 - Early Hearing:

The time so appointed shall be the earliest day which the judge can devote to hearing the cause of the applicant.

Article 11.40 - Prisoner Discharged:

The judge or court before whom a person is brought by writ of habeas corpus shall examine the writ and the papers attached to it; and if no legal cause be shown for the imprisonment or restraint, or if it appears that the imprisonment or restraint though at first legal, cannot for any cause be lawfully prolonged, the applicant shall be discharged.

Article 14.01 - Offense Within View:

(a) A peace officer or any other person, may without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Article 14.06 - Must Take Offender Before Magistrate:

In each case enumeraged in this Code, the person making the arrest (WITHOUT A WARRANT) shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

Article 15.01 - Warrant of Arrest:

A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law.

Article 15.04 - Complaint:

The affidavit made before the magistrate or district or county attorney is called a "complaint" if it charges the commission of an offense.

Article 15.16 - How Warrant is Executed:

The officer or person executing a warrant of arrest shall without unnecessary delay take the person or have him taken before the magistrate who issued the warrant or before the magistrate named in the warrant, if the magistrate is in the same county where the person is arrested. If the issuing or named magistrate is in another county, the person arrested shall without unnecessary delay be taken before some magistrate in the county in which he was arrested.

Article 15.17 - Duties of Arresting Officers And Magistrates:

In each case enumerated in this Code, the person making the arrest shall, without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him, and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the State, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The Magistrate shall allow the person arrested reasonable time and the opportunity to consult counsel and shall admit the person to bail if allowed by law.

Article 16.01 - Examining Trial:

When the accused has been brought before a magistrate for an examining trial, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint counsel to represent the accused in such examining trial only, to be compensated as otherwise provided in the Code. The accused in any felony case shall have the right to an examining trial before indictment in the cpimtu having jurisdiction of the offense, whether he be in custody or on bail, at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case.

Article 16.07 - Same Rules of Evidence As On Final Trial:

The sames rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial.

Article 16.08 - Presence of Accused:

The examination of each witness shall be in the presence of the accused.

Article 16.17 - Decision of Judge:

After the examining trial has been had, the judge shall make an order committing the defendant to jail of the proper county, discharging him or admitting him to bail, as the law and the facts of the case may require. Failure of the judge to make or enter an order within 48 hours after the examining trial has been completed operates as a finding of no probable cause and the accused shall be discharged.

Article 21.01 - Indictment:

An "indictment" is the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense.

Article 21.20 - Information:

An "information" is a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted.

Article 21.21 - Requisites of an Information:

An information is sufficient if it has the following requisites;

1. . . .
2. That it appear to have been presented in a court having jurisdiction of the offense set forth;
3. That it appears to have been presented by the proper officer.
4. That it contain the name of the accused . . .
5. It must appear that the place where the offense is charged to have been committeed within the jurisdiction of the court where the information is filed.
6. That the time mentioned be some date anterior to the filing of the information . . .
7. That the offense be set forth in plain and intelligible words.
8. . . .
9. That it be signed by the district or county attorney, officially.

Article 21.22 - Information Based Upon Complaint:

No information shall be presented until affidavit has been made by some credible person charging the defendant with an offense. The affidavit shall be filed with the information. It may be sworn to before the district or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths.

Article 23.01 - Definition of "Capias":

A "capias" is a writ issued by the court or clerk, and directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.

Supreme Court, U. S.
FILED
JAN 17 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973
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RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

-vs-

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF *AMICUS CURIAE* (STATE OF FLORIDA) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

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Respondents.

BRIEF OF *AMICUS CURIAE* (STATE OF FLORIDA) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

Comes now the State of Florida, by and through its Attorney General, and files its brief *Amicus Curiae* in the above-styled cause on behalf of Petitioner.

Amicus adopts *in toto* the position taken by Petitioner in the brief heretofore filed in this Court, and in addition thereto submits the cause should be reversed for the reasons stated hereinafter.

QUESTION PRESENTED

THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT ARRESTEES HELD FOR TRIAL UPON INFORMATIONS FILED BY THE STATE ATTORNEY MUST BE AFFORDED PRELIMINARY HEARINGS BEFORE A JUDICIAL OFFICER WITHOUT UNNECESSARY DELAY NOTWITHSTANDING RULE 3.131(a), FLORIDA RULES OF CRIMINAL PROCEDURE.

ARGUMENT

The United States Court of Appeals, as well as the District Court, held that the Fourth and Fourteenth Amendments affirmatively require that arrestees held for trial upon informations filed by the state attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay, in effect declaring Rule 3.131(a), Florida Rules of Criminal Procedure, unconstitutional, for said Rule dispenses with preliminary hearings to a defendant charged by an information or indictment.[1]

---

[1]Subsection (b) of said Rule was wholly misconstrued by the Court of Appeals for that section only pertains to persons who have not been indicted or informed, but who have been arrested on a warrant or in some cases without one. It does not mean persons charged by indictment or information are entitled to a preliminary examination within 72 hours.

The lower courts both recognized the nonnecessity of a preliminary examination wherein an indictment is returned against the accused, which is not surprising in light of this Court's Rule 5, Federal Rules of Criminal Procedure. Subsection (c) provides:

> "(c) Offenses Not Triable by the United States Magistrate.
>
> * * *
>
> "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court

before the date set for the preliminary examination.
* * *." [Emphasis Supplied]

The lower court's conclusion that a preliminary examination could not be dispensed with where the defendant is held pursuant to a charge contained in an information, but such could be done where the accused is charged by an indictment was in no way explained by either tribunal. If one procedural method offends due process and the other does not, then it would necessarily follow that there is a substantial difference in the two methods. The State of Florida suggests the differences that may exist are more illusionary than real. It is the same state attorney who draws a direct information, based upon testimony presented to him under oath, who brings the evidence to the grand jury, advises them as to the various laws that might be involved and in most cases makes a recommendation as to whether they should indict or not. Indeed, there are many individuals who suggest that the grand jury has out lived its usefulness because of the power exerted over them by the over-zealous prosecutor. Of course, grand jurors are lay persons selected from the community at large and under no circumstance can they be considered a "judicial magistrate." If one is intellectually honest about the matter, he must admit that while there may be a distinction between the two methods in law, there is virtually no difference in fact or in substance. Needless to say, if one is truly concerned with substance, different principles cannot be applied in

cases where a person is charged by an indictment on one hand and by an information on the other.

It is specifically because of the fact that there is no difference that the Florida Supreme Court saw fit to adopt 3.131(a), Florida Rules of Criminal Procedure, dispensing with preliminary hearings if the defendant is charged in an information or indictment and is perhaps why this Court did the same in Rule 5, Federal Rules of Criminal Procedure.

The Court of Appeals' reliance upon *Coolidge v. New Hampshire*, 403 U.S. 443 (1970) and *Morrissey v. Brewer*, 408 U.S. 471 (1971) is clearly misplaced. *Coolidge v. New Hampshire* dealt with the issuance of a warrant to justify the seizure of property, and this Court held a warrant had to be issued by a neutral magistrate under the Fourth Amendment of the United States Constitution. *Coolidge* did not hold that subsequent to the seizure there had to be a judicial examination to determine whether there was a basis to continue to hold the evidence. The *Coolidge* case is simply not applicable for if it were, the plaintiffs would have been asserting that they could not be arrested without a warrant issued by a judicial officer, a proposition this Court rejected in *Trupiano v. United States*, 334 U.S. 699 (1948), or that they had to have a preliminary examination prior to the filing of an information, a proposition this Court repudiated in *Hurtado v. California*, 110 U.S. 516 (1884).

In *Morrissey v. Brewer*, supra, this Court held a parolee was entitled to a prompt hearing to determine probable cause before someone not directly involved with the alleged violator. This Court did not require that it be before a judicial officer, just someone not directly involved with the parolee. That is precisely what the state attorney is! In this respect, Rule 3.131(a) is consistent with the rationale of *Morrissey*, not antagonistic to it. Moreover, and perhaps more importantly is the uniqueness of the institution of parole itself. In *Morrissey*, the Court observed that the revocation hearings were often times held in places far removed from the place where the violation occurred and without compulsory process the parolee could not adequately present a defense to the charge. It was this very fact which caused this Court to hold that due process required there be a "minimal inquiry near the place of the alleged parole violation." No such problem exists in a criminal case, for the defendant must be tried in the county wherein the crime is committed and a defendant in a criminal trial clearly has the right to compulsory process of witnesses. Accordingly, a *Morrissey* hearing in the context of a criminal trial serves no valid purpose and certainly the absence of such a hearing does not violate the Due Process contemplated in *Morrissey*.

The State of Florida urges that the dispensation of preliminary examinations wherein an information is filed should be approved by this Court for the same reasons that it is dispensed with when a person is charged by an indictment, and that due process is not offended thereby.

Examination of the Florida Rules of Criminal Procedure, specifically Rules 3.130, 3.191, and 3.220 will reveal that in light of those procedural safeguards due process is not violated by the failure to provide for preliminary hearings where the accused is charged by an information or indictment.

In *Coleman v. Alabama*, 399 U.S. 1 (1970), this Court held due process required the appointment of counsel to represent an indigent at a preliminary hearing because in Alabama it was a critical stage of the criminal proceeding. This Court, of course, did not hold the state had to hold such hearings,[2] but merely that where one was held counsel had to be provided. The Court in concluding such hearings were "critical stages" of the proceedings noted the advantages to be gained by the defendant saying:

> "'First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over.

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[2]Interestingly, Mr. Justice White's special concurring opinion assumed such hearings could be dispensed with for he opined, "Our ruling may also invite eliminating the preliminary hearing system entirely" 399 U.S. at 18. Obviously, if the constitution required them they could not be eliminated.

> Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the t .al. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.'"
> 399 U.S. at 9

Under Florida law the interests or rights referred to above are readily available to the defendant without a preliminary hearing ever being held.

Florida law clearly authorizes the prosecuting officer to file an information against the accused even if no probable cause has been found. *State v. Hernandez*, 217 So.2d 109 (Fla. 1968). Florida's discovery rules, to-wit: Rule 3.220, are the most comprehensive rules of discovery in the United States, and under those rules he has a right to take the deposition of all of the witnesses the state intends to use at trial. Rule 3.220(d) These

depositions may be taken "at any time after the filing of the indictment or information." This discovery together with evidence the state attorney must disclose to the defendant and his counsel for inspection and copying under Rule 3.220(a) and (b) provides the defendant with ample "impeachment tools for use in cross-examination of the State's witnesses at the trial", and insures that he will be able to prepare a "proper defense." Indeed, when one considers that a preliminary hearing can be conducted without all of the State's witnesses and may rest solely on hearsay evidence "in whole or in part", Rule 5.1, Federal Rules of Criminal Procedure, use of the discovery rules is better designed to provide the defendant with the information this Court indicated he might obtain at a preliminary hearing.

Insofar as acting as a conduit to bail or psyciatric examinations, the preliminary hearing is totally unnecessary in this State. Rule 3.130, Florida Rules of Criminal Procedure requires a first appearance within 24 hours of arrest, 3.130 (b)(1), and it is at this hearing that the trial judge is to determine whether bail is even necessary to assure the defendant's appearance for he may release him on his own recognizance and, of course, the defendant is "entitled as of right to be admitted to bail before conviction", 3.130(b)(4), unless the offense charged is a capital offense or an offense punishable by life imprisonment, in which case the proof of guilt must be evident or the presumption great. Since bail is determined prior to the time that any

meaningful preliminary hearing could be held,[3] such a hearing could have no relevancy or bearing upon bail. Rule 3.210 provides for an inquiry into the defendant's sanity on motion at any time before or during trial and the preliminary hearing is not needed for this purpose.

Florida's mandatory speedy trial rule, Rule 3.191, compliments the rights referred to above, and it is respectfully suggested that in this State no substantial right is denied to an individual accused with the commission of a crime because he is not afforded a preliminary examination where he has been charged by an indictment or information. The district court erred in concluding due process required

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[3] The Respondents object to the alleged timeliness of the preliminary hearing and the district court was concerned about the fact that a "...deprivation of liberty for four days, absent a judicial determination of probable cause, is questionable..." (App. 111) This is indeed strange, for this Court's Rules provide the magistrate shall schedule a preliminary examination within a "reasonable time . . . not later than 10 days following the initial appearance if the defendant is in custody..." Rule 5(c)! The Court's conclusion that "...an eight day (24 hours for initial appearance plus seven days) deprivation of liberty is not reasonable..." (App. 111) is clearly erroneous under Rule 5(c).

such hearings and the Court of Appeals, Fifth Circuit, erred in affirming such conclusion.

Florida's recently amended Rules of Criminal Procedure which were designed to "...secure the just, speedy and efficient disposition of criminal cases..." Rule 3.025(a) represents an experiment by one state to devise a criminal justice system that will work better than the system that everyone admits is fraught with delay, surprise and injustice. Isolated portions, without regard to the whole were, in effect, declared unconstitutional before they were even implemented and put into use. What makes this so incomprehensible was that the rule faulted was modeled to a great extent after this Court's rules pertaining to first appearances, the difference being that preliminary hearings are dispensed with where the defendant is charged by an indictment or an information under Florida's Rules. As has been urged above, the two methods of charging are so similar, in fact, that this modification of the rule in no way alters its substantive worth.

The United States Court of Appeals, Fifth Circuit, erred in concluding under Florida prosecutorial rules an individual charged with a crime by an information must be accorded a preliminary examination, and the failure to do so violates due process of law. This Court should reverse said holding.

Whether the decision of the Fifth Circuit Court of Appeals can invest a lesser tribunal (magistrate-county judge) with jurisdiction sufficient to disturb the custody of a defendant held in jail as a result of having been charged by information with a crime in Florida is what this Court must decide.

The Supreme Court of Florida is the final and unreviewable interpreter of Florida law and, with respect to matters of state law, the decisions of that court binds everyone. *Scripto, Inc. v. Carson*, 362 U.S. 207, 4 L.ed.2d 660, 80 S.Ct. 619; *Murdock v. Memphis*, 20 Wall. 590 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. As recently as 1964, this very Court in pursuance of Rule 4.61, Florida Appellate Rules, 31 F.S.A., requested of the Florida Supreme Court a decision by that tribunal regarding the jurisdiction of the several courts involved in that case so that it could, in turn, determine whether matters pending before it should be disposed of in one as opposed to another fashion. *Dresner v. Tallahassee*, 375 U.S. 136, 11 L.ed.2d 208, 84 S.Ct. 235. After having received the opinion of the Florida Supreme Court, the matters involved as to

Dresner were dismissed by this Court in the following language:

> "PER CURIAM.
> The questions which this Court certified to the Supreme Court of Florida, 375 U.S. 136, 11 L.Ed.2d 208, 84 S.Ct. 235, having been answered in the affirmative, 164 So.2d 208, the writ of certiorari is dismissed as improvidently granted. 28 USC § 1257." 378 U.S. 539, 12 L.ed.2d 1018, 84 S.Ct. 1895.

Again, this Court in *Callendar v. Florida*, 380 U.S. 519, 85 S.Ct. 1325, 14 L.ed.2d 265 (1965), and *Callendar v. Florida*, 383 U.S. 270, 15 L.ed.2d 749, 86 S.Ct. 924 (1966), recognized that it was bound by the Florida Supreme Court's determination regarding the jurisdiction of courts in Florida.

It follows that this Court has repeatedly recognized the exclusive authority of the Florida Supreme Court to determine the jurisdiction of the several courts of the State of Florida. See *Dresner v. Tallahassee*, supra, and *Callendar v. State*, supra.

By operation of law (Article V, Section 2, Constitution of the State of Florida, see addendum at page 1307 through 1312 of Volume 3, Florida Statutes, 1971), the Florida Supreme Court is vested with the exclusive authority to promulgate rules and regulations regarding both jurisdiction and practice in the several courts of the state. It has adopted what is known as Florida Rules of Criminal Procedure, effective February 1, 1973, wherein the procedure to be followed with regard to arrestees is set out therein and in particular in Rules 3.120, 3.130 and 3.131.

That same Article V, Section 5, sets forth the jurisdiction of the circuit courts of the State of Florida, and Section 6 thereof sets forth the jurisdiction of the county courts. It may be easily noted that the circuit courts have jurisdiction of all matters not vested in the county courts.

When an individual is indicted or informed against in the State of Florida, those formal charges are routinely filed with the clerk of the circuit court where the charge is brought, thereby vesting the circuit court with jurisdiction of the accused and the subject matter until such time as the issues have been disposed of. Obviously the circuit court has jurisdiction to dispose of all matters relating to that formal charge and in so doing is reviewable on appeal

as a matter of right to the appropriate district court of appeal or to the Florida Supreme Court as the case may be.

The criminal jurisdiction of the county court is limited to misdemeanors. Accordingly, they are, in the judicial structure of the State of Florida, a lesser tribunal--in short they are Florida's magistrates much as the former United States Commissioners are now federal magistrates. In that posture their jurisdiction no more permits them to invade the province of the circuit court regarding the custody of an accused against whom an information has been filed than could a federal magistrate invade the province of a Federal District Court once an accused has been informed against. Only the circuit court or a district court of appeal or the Florida Supreme Court, or conceivably this Court, has authority to alter the custody of an individual so confined.

By ruling as it did in the decision below, the Court of Appeals purported to vest the several magistrates (county judges) in Florida with jurisdiction to review an accused's custody ostensibly on the theory of a preliminary hearing. The net effect of this is to permit (by dint of an impossible judicial fiat) Florida's lowest court to override the authority of a Florida circuit court, even to the point of ordering the release of an accused theretofore con-

trolled only by the circuit court or by the other courts above it mentioned previously. The Florida Supreme Court has never vested magistrates with that kind of authority--they do not now have it--and they cannot be given it, however desirable that conclusion may appear to the Court of Appeal below.

The upshot of the action taken by the Court of Appeals in this matter, is that an allegedly impartial magistrate is the *key* which insures that due process attends the proceedings they reviewed.

Apparently no one involved in this litigation quarrels with the proposition that a given state attorney in Florida is free to file informations by virtue of the authority vested in him to so do under Florida law. It also seems apparent that nobody quarrels with the proposition that at preliminary hearings for those arrested on a warrant (no indictment or information having been filed) a magistrate in Florida is free within the bounds of propriety to either find probable cause and bind one over for trial, or find its absence and order his release. Accordingly, some questions must arise as to whether this magistrate's preliminary hearing is, in fact, any *key*

at all.

Ostensibly, the only difference between the matter set out immediately above and the following, is that an information has been filed and the individual has been arrested on a *capias* based thereon. In either instance, no particular arguments would arise in those cases in which the magistrate found probable cause and entered an order binding the accused over for trial in the circuit court. We ask, "Suppose he finds an absence of probable cause and orders the individual released from custody under the charge?" Not in either instance would such an order prohibit the state attorney from thereafter filing his information, securing a *capias*, and having the accused arrested thereon and confined as a result thereof. By like token in the initial illustration of an individual arrested on a warrant without an information or an indictment having been filed against him, a finding of probable cause by the magistrate accompanied by an order binding him over for trial, does not require the state attorney to bring any charges against the individual either by indictment or information--that being the province of the state attorney's good judgment alone.

So it is that four possibilities exist in the relationship of the office of the state attorney and that of Florida's county judge-magistrate:

1. Finding of probable cause by a magistrate against an individual routinely arrested but neither indicted nor informed against.

2. A finding of a lack of probable cause by a magistrate against an individual routinely arrested but neither indicted nor informed against.

3. A finding of probable cause against an individual arrested based upon an information.

4. A finding of an absence of probable cause for an individual arrested based upon an information.

Of these, certainly the situations involved in numbers 1, 2, and 4 have absolutely no effect upon the subsequent action taken by the state attorney with regard to the individual involved.

It is at best doubtful that even the situation set out in number 3 has any effect upon the state attorney in terms of a requirement that he continue to prosecute the arrestee against whom the magistrate has found probable cause. This is so for the reason that the state attorney is free to file in court his order *nolle prosequi* at any time before the verdict

is returned by the jury. In this he cannot be challenged.

Since it is obvious that in virtually all four of the only possible instances that could arise the magistrate has absolutely no control over the disposition of the accused in terms of the criminal charge, one must wonder at just what, if anything, the opinion of the Court of Appeals below was meant to accomplish. Certainly it cannot be said that the illegal detention of an accused was its grail. *Amicus* has demonstrated beyond question that such disposition simply cannot be made by <u>anyone</u> who sits in the capacity of a magistrate--certainly never a county judge in the state of Florida--quite likely no other judge or justice at any time prior to trial unless on a petition for writ of habeas corpus urging a total absence of any evidence.

If the magistrate and the preliminary hearing are to be the *key* which we submit can be the only intention of the decision of the Court of Appeals, then such a *key* must both lock and unlock the door to an arrestee's custody regardless of what prompted the arrest. Since it could not be the *key* before the decision of the Court of Appeals and cannot be as a result of it, it should be characterized as just what it is (in light of this Court's own decisions in matters virtually identical to this situation in all particulars and this

Court's own rules of procedure dealing with identical matters)--a judicial futility.

CONCLUSION

For these reasons, *Amicus* respectfully urges this Court to reverse the holding of the Court of Appeals in and for the Fifth Circuit in this cause.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, GEORGE R. GEORGIEFF, Counsel for *Amicus Curiea*, and a member of the Bar of the United States, hereby certify that on the _____ day of January, 1974, I served copies of the Brief of *Amicus Curiae* on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents; and Peter L. Nimkoff, Esquire, Suite 607, Ainsley Building, 14 N.E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by a duly addressed envelope with postage prepaid.

_____
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Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

IN THE
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OF THE UNITED STATES

October Term, 1973
No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

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This brief is filed with this Court pursuant to the authority found in paragraph 4 of Rule 42 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

This Court has afforded an opportunity to each Attorney General of every State or Commonwealth to file an amicus curiae brief in this case.

This brief presented by the Office of the Los Angeles District Attorney on behalf of the Appellate Committee of the California District Attorneys Association and joined by the Attorney General of the State of California is basically directed as to the questions raised relating to misdemeanor prosecutions. Under California's Constitution and statutes in every felony prosecution not initiated by indictment the right to a preliminary hearing is afforded any person (Cal.Const.Art. I, Sec. 8; Cal.Pen. Code Secs. 17(a), 738-739, 858-883, 949).

Since misdemeanor prosecutions in California are customarily processed at trial and on appeal by district attorneys and city attorneys the matter was referred by the Attorney General to the Appellate Committee of the California District Attorneys Association which authorized the filing of the brief.

By virtue of the importance of this case to the administration of criminal

justice in misdemeanor cases and to the criminal justice system as a whole in California the Office of the Attorney General of California has joined in this brief.

SUMMARY OF THE ARGUMENT

In Argument I we discuss those factors which appear to us to have been heavily weighed by the courts below and unduly influenced them in concluding that a probable cause preliminary hearing is constitutionally required in all prosecutions of persons in actual custody awaiting trial. These factors relate to what we perceive to be the principal causes of grievance and they are the formerly existing practices in Florida of holding a person in actual custody a substantial time before charges are filed and before there is a trial. We also point out a few matters which were insufficiently considered by the courts below.

We discuss in Argument II whether the equal protection clause requires that an accused charged with a misdemeanor is entitled to a preliminary hearing if he is in actual custody just because a felony defendant is entitled to such a hearing (unless waived or indicted by grand jury) -- having assumed only arguendo that a felony defendant is constitutionally entitled to such a hearing. Our conclusion is in the negative because there are differences between misdemeanor and felony prosecutions. These differences include

the gravity of the offense (considered either with respect to the stigma which attaches to a conviction or the potentially greater punishment), the longer time limits which are reasonably permitted before an accused is brought to trial, and the practical need not to further congest the calendars of inferior courts.

In Argument III we show that the courts granted relief to defendants in actual custody in Florida misdemeanor prosecutions which accords them rights which are not accorded to defendants charged with misdemeanors in federal prosecutions. Specifically, we show that defendants charged with misdemeanors in federal prosecutions are not entitled to preliminary hearings although they are entitled to having probable cause determinations if they have been or will be arrested on the accusatory pleading. Our argument assumed only arguendo that there is a federal constitutional right to a pretrial probable cause determination for a misdemeanor defendant in actual custody.

In Argument IV we show how in California the law provides ample protection to defendants charged with misdemeanors who are held in actual custody awaiting trial and that there is no federal consti-

tutional right to have a probable cause preliminary hearing or an automatic pre-trial probable cause determination (unless waived) in such cases.

Finally, in Argument V we argue that the courts below exceeded their authority in granting the relief complained of by petitioner because such relief exceeded that which is compelled by the United States Constitution and that by such relief the courts below improperly attempted to supervise the administration of criminal justice in the courts of the State of Florida.

ARGUMENT

I

THE COURTS BELOW HAVE GRANTED RELIEF WITHOUT SUFFICIENT CONSIDERATION OF FACTORS WHICH HAD THEY BEEN FULLY APPRECIATED WOULD HAVE AFFECTED THE NATURE AND SCOPE OF THE RELIEF GRANTED

In this portion of our brief we wish to set forth our views as to what are <u>not</u> the issues for the purpose of making clear the import of our positions as to the matters which interest us in this case. In so doing, we hope to note pseudo-issues which may becloud the resolution of the true issues.

(1) First, we think that a proper resolution of the issues of this case may be obscured by failing to distinguish the problems relating to the requirement of a determination by a judge or magistrate that probable cause exists for believing that the defendant committed one or more of the public offenses charged against him in the accusatory pleading and those relating to the right of a person in custody to be taken before a magistrate without "unnecessary delay" so that he may be informed of his rights and of the charges

under which he is being held in custody, with an opportunity to be released on bail or on his own recognizance. Thus, the Court of Appeal below recited that:

> "Criminal actions in Dade County, therefore, often proceed upon information sworn to by the state attorney either before or after arrest without any judicial scrutiny prior to arraignment. If unable or unwilling to post bail, arrestees remain in jail at least until arraignment. This incarceration may last as long as 30 days, and at least three days must pass before an information is filed against an arrestee and the case is calendared. During this period, the defendant sees no judicial officer other than the bail judge. Arraignment is the first opportunity for a magistrate to inspect the state attorney's information setting forth the cause upon which the defendant

> was arrested." (483 F.2d 778, at 780-781. Fn's. omitted.)[1/]

Briefly, we should point out that in California an arrested person must in all

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1. Delays before arraignment on an information are more fully discussed in Pugh v. Rainwater, 332 F.Supp. 1107, at 1109-1111. In a deposition by Mr. James Reagan, Jr., he stated that he knew of no case in which a police officer presented himself before the State Attorney to file the information more than a month after an arrest and he "cannot recall of anything over two weeks, personally. Of course, I am not saying there have not been occasions." (See Appendix on Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit, 32, at 47-48.) In "jail cases" he stated that the information is processed by the prosecutor's office within 72 hours at the outside (counting working days only) and ordinarily filed the nearest working day. (Ibid., at 49-51.) He further testified that "the average would be between ten and fifteen days" from the time the complaining party appears before the prosecutor and the case is put on the calendar and the defendant appears in court. (Ibid., at 57.) Of course, in view of the subsequent adoption of Rules 3.130(b)(1) and 3.131 of the Florida Rules of Criminal Procedure, as amended, much of the delay problems relating to the filing of the accusatory pleading and arraignment are resolved. Rule 3.130(b)(1) requires that "every arrested person shall be taken before a judicial officer within twenty-four (24) hours of his arrest." By virtue of Rule 3.131 an information must be filed within 96 hours from the time of the defendant's first appearance when the defendant is in custody.

cases be taken before the magistrate without unnecessary delay, and in any event, within two days after his arrest, excluding Sundays and holidays. If a detention of less than two days is unreasonable under the circumstances, such detention is in violation of statute. (See, Cal.Pen. Code, §§ 825, 849; People v. Powell (1967) 67 Cal.2d 32, 59, 429 P.2d 137.) The right to be taken before a magistrate without unnecessary delay is a fundamental right of the arrested person arising from the Constitution which must be obeyed. (See, People v. Powell, supra, 67 Cal.2d at 59-60.) A violation of a defendant's right to be taken before a magistrate without unnecessary delay does not require reversal "unless he shows that through such wrongful conduct he was deprived of a fair trial or otherwise suffered prejudice as a result thereof." (People v. Combes (1961) 56 Cal. 2d 135, 142, 363 P.2d 4.) However, the writ of habeas corpus is available as a remedy to secure compliance with the requirement that an arrested person be taken before a magistrate without unnecessary delay. It "is commonly used to test the legality of the restraint of one who is arrested and detained without warrant or without any charge being brought against

him. The effect of the writ at this stage is to compel the arresting officers either to release him or to charge him with an offense cognizable in the law, for one cannot be held, tried, or sentenced except for a specific crime constituting a crime." (24 CAL. JUR. 2d, Habeas Corpus, § 25, pp. 448-449. Fn's. omitted.)

We have set forth at length these matters concerning an arrested person's right to be taken before a magistrate without unncessary delay and to be charged with an offense in an accusatory pleading or be released from custody because it appears to us to have been inextricably entangled with consideration in the courts below as to who, when, and in what manner the question of probable cause to detain a person in custody for trial on criminal charges is to be resolved. It is no doubt that because in Florida an arrested person could formerly remain incarcerated up to approximately thirty days before an accusatory pleading is filed and be arraigned on such charges that the Court of Appeal and the District Court undertook

an overly broad supervision of the administration of criminal justice in Florida and required prophylactic rules which go far beyond, in our opinion, of what is required by the United States Constitution.[2/] With all due respect, this may be an instance of the maxim that bad cases make bad law.

(2) Again, an ominous cloud which obfuscates a clear resolution of the issues raised in this proceeding may have been formed by concern for the right of speedy trial for persons charged with misdemeanors who remain in custody (i.e., they have not been released on bail or on recognizance) beyond thirty days (approximately). Under Florida law, unless a case is continued for good cause, every person charged with a

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2. We do not wish to be understood as implying that the writ of habeas corpus is not available under Florida law as a remedy for unreasonable delays in the process of either releasing an arrested person from custody or being charged formally and being arraigned promptly. (See, Florida Constitution, Declaration of Rights, § 7; Florida Statutes Annotated, Chapter 79, §§ 79.01-79.12.) We do not presume to undertake to discuss the availability of the writ in Florida courts for the purposes in question, but we are puzzled by the fact that there has been no discussion of its possible availability by petitioner, respondent, the Court of Appeals or the District Court, except insofar as it was adverted to by counsel before this Court in oral argument. (See 42 U.S.Law Week 3549-3550.)

crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor or upon demand within 60 days. (Rule 3.191, Florida Rules of Criminal Procedure.) We will argue more extensively that a speedy trial in a misdemeanor case of a person in custody itself provides implicitly a speedy determination of the issue whether the accused has been detained upon probable cause to believe he has committed one or more of the offenses charged against him. That is, the trial itself constitutes a <u>hearing</u> upon the issue of probable cause.

We do not think for reasons set forth herein that a person in custody charged with a misdemeanor is entitled to a preliminary hearing upon the issue of probable cause to detain him for trial. At most, he is entitled to have the issue of probable cause for his detention for trial resolved by a magistrate or judge without such hearing. A hearing on the issue provided by a trial provides a substitute device for resolving the matter. Without urging upon this Court that a trial within sixty days after arraignment upon demand of a person in custody on misdemeanor charges constitutes an unreasonable

period in which probable cause issues can be determined, any infirmity in Florida law respecting this matter should not be visited upon those States which provide for speedy trial within shorter time limits than those of Florida. For example, California Penal Code section 1382 provides in part:

> "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
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> * * * * *
>
> "3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial within 30 days after he is arraigned if he is in custody at the time of arraignment, ... except that an action shall not be dismissed under this subdivision (1) if it is set for trial on a date beyond the prescribed period at the request of the defendant or with his consent, express or implied, and the defendant is brought to trial on the date so set for trial or within 10 days thereafter or (2) if it is not tried on the date

> set for trial because of the defendant's neglect or failure to appear, in which case he shall be deemed to have been arraigned within the meaning of this subdivision on the date of his subsequent arraignment on a bench warrant or his submission to the court.
>
> "If the defendant is not represented by counsel, he shall not be deemed under this section to have consented to the date for his trial unless the court has explained to him his rights under this section and the effect of his consent."

Under California law, unless there is some other cause for detaining a person in custody, if a case is not brought to trial within the time limits of the mandatory dismissal statutes and a motion to dismiss for want of a speedy trial is denied, the defendant may secure his release on habeas corpus if there is no plain, speedy, or adequate remedy, or by some other appropriate remedy which the law has provided. (In re Alpine (1928) 203 Cal. 731, 740, 265 P. 947.) A prisoner may not be released on habeas corpus until the statutory period has expired even where the order

unlawfully provided for an extension for a period beyond the statutory period. (Ex parte Ross (1889) 82 Cal. 109, 110, 22 P. 1086.) However, under current practice a defendant is entitled to the extraordinary writ of mandamus to compel the dismissal of charges where the case has not been brought to trial within the time limits of the statutory dismissal statutes or to the writ of prohibition to prevent the trial. (See, Witkin, CALIFORNIA CRIMINAL PROCEDURE (including 1973 Supplement) § 307; Barker v. Municipal Court (1966) 64 Cal.2d 806, 415 P.2d 809.) It should be noted that historically the writ of habeas corpus is available to enforce the right to a speedy trial and statutory time limits, but "does not entitle the accused to a discharge on account of the failure of the law, while reasonably adapted to secure a speedy trial, to provide against every contingency which may occasion delay made necessary by the law itself." (W. Church, TREATISE ON THE WRIT OF HABEAS CORPUS (2d Ed. 1893), § 254, pp. 355-356. Fn's. omitted.) We feel that the hidden issue of the constitutional right of a person in actual custody to a speedy trial on misdemeanor charges has been excaberated by substantial

prearraignment delays which formerly took place in Florida.

It is our position, to be advocated herein, that a defendant in actual custody on the misdemeanor charges who has a trial within 30 days after he is arraigned without necessary delay is afforded a speedy determination of whether there was probable cause to detain him for trial in conformity with due process of law. While a trial of a person in custody upon demand within sixty days does not offend the Constitutional right to a speedy trial, we think it important to inquire whether it provides an early enough device for determining the probable cause issue if raised by the defendant in custody.

In this connection, it is noteworthy that the National Advisory Commission on Criminal Justice Standards and Goals recommended that "[p]reliminary hearings should not be available in misdemeanor prosecutions." Its reason was, "[g]iven the minor penalties that may be assessed for conviction of a misdemeanor, such prosecutions need not involve the complexities of a felony case. . . . [¶] Since a misdemeanor trial will occur quickly and its burden is significantly less than that of a felony trial, the Commission

believes that the preliminary hearing - and the protection it may afford against an unjustified trial - is not necessary in misdemeanor cases." (COURTS, Standard 4.3, p. 73.) The Commission also recommended that, "In a misdemeanor prosecution, the period from arrest to trial generally should be 30 days or less." It commented, "The periods in the standard are significantly shorter than many other proposals, but the Commission believes that they are realistic if it is recognized that they relate only to the norm or average and do not impose outside limits."

We submit that a factor which may have heavily weighed upon the courts below was that Florida's time limits for misdemeanor trials of persons in custody establish norms which may be insufficient for using the trial as a reasonably speedy forum for determining probable cause for holding for trial and obviating the need for a preliminary hearing or another form of pretrial probable cause determination.

(3) We are also apprehensive that insufficient consideration has been given to exactly what is encompassed in a proceeding to determine whether probable cause exists to believe that a defendant in custody has committed one or more of

the offenses charged against him. There may have been an unlawful arrest for any number of grounds, including the absence of probable cause on the part of the arresting officer or private person. Pursuant to such unlawful arrest, evidence may have been obtained which would be inadmissible under the exclusionary rule if the issue of illegally obtained evidence was raised before or at the trial. Yet, it is well settled that an unlawful arrest does not impair the power of a court to try a person for crime because he had been brought within the court's jurisdiction by reason of such arrest. (Albrecht v. United States (1926) 273 U.S. 1, 71 L.Ed. 505, 508, 47 S.Ct. 250; Frisbie v. Collins (1952) 342 U.S. 519, 96 L.Ed. 541, 72 S.Ct. 509.) "Once an accusatory pleading has been filed . . . a defendant is no longer held on the arrest warrant, and thus he cannot complain solely on the bases of an alleged defect in the issuance of the warrant. It is no defense to a state or federal criminal prosecution that a defendant was illegally arrested or forcibly brought within the jurisdiction of the court. ([Citation to Frisbie v. Collins, supra.]) If he can show that law enforcement officials exploited the period of illegal detention to

obtain evidence utilized at trial, of course, he is entitled to have the evidence suppressed." (People v. Bradford (1969) 70 Cal.2d 333, 344-345, 450 P.2d 46.) It is axiomatic that the state may not use evidence to convict an accused which it obtained by exploiting an illegal arrest or detention. Wong Sun v. United States (1963) 371 U.S. 471, 484-485, 9 L.Ed.2d 441, 453-454, 83 S.Ct. 407; People v. Sesslin (1968) 68 Cal.2d 418, 426-427, 439 P.2d 321.)

It is clear that subject to the exclusionary rules relating to illegally obtained evidence and their poisoned fruit, the mere fact that a defendant has been arrested without probable cause does not defeat the jurisdiction of the court to proceed with the prosecution. The question is solely whether there is probable cause to now detain the accused for trial. While it must be acknowledged that the Court of Appeal below does not imply whatsoever that the preliminary hearing on probable cause to hold an accused for trial relates to whether there had been an unlawful arrest, it failed to consider whether the magistrate or judge in determining probable cause to hold an accused in custody for trial must resolve issues relating to

illegally obtained evidence or its fruit at such a hearing. If the issue is raised at the probable cause hearing, must the magistrate exclude evidence illegally obtained because of an unlawful arrest, search, seizure, detention, interrogation, line-up, etc.? - If he can properly exclude evidence of an accused's statements obtained by inherently coercive methods (see Brown v. Mississippi (1935) 297 U.S. 278, 80 L.Ed. 682, 56 S.Ct. 461), must he also exclude evidence of an accused's statements obtained not by inherently coersive methods but only in violation of rules respecting admonition of rights prior to interrogation announced in Miranda v. Arizona (1966) 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602? If the magistrate can properly exclude evidence obtained by "conduct that shocks the conscience" (Rochin v. California (1952) 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205), must he also exclude evidence obtained by searches or seizures by conduct which does not shock the conscience, such as in Chimel v. California (1969) 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034? Other problems suggest themselves, and we regret to note that neither the Court of Appeal nor the District Court addressed themselves to them.

We are of the view that if this Court holds (contrary to our position) that a preliminary hearing is required in misdemeanor prosecutions to determine whether there is probable cause to hold the defendant for trial, then it should make clear that any hearing or determination should not be burdened with issues relating to exclusionary rules. (Cf. United States v. Calandra (1974) ___ U.S. ___, 38 L.Ed.2d 561, 94 S.Ct. 613.) This is especially vital for those states which provide for resolution of such issues before or at the trial upon motion.[3] The necessity for such a restriction upon any such probable

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3. California Penal Code section 1538.5, which establishes procedures for litigating search and seizure issues, provides in part:

> "(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure . . . . (h) If, prior to the trial of a . . . misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice . . . court."

cause to hold for trial proceeding in misdemeanor cases becomes compelling since (as we understand it) the hearing can be held before the accused pleads to the accusatory pleading and whether or not he moves to raise issues relating to illegally obtained evidence.

II

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE A PROBABLE CAUSE PRELIMINARY HEARING FOR A PRISONER CHARGED WITH A MISDEMEANOR[4]

We have responded to the request for the filing of amicus curiae briefs in the instant case because the State of California has a vital interest in some of the issues now pending before this Court.

However, we should first point out what is not of such interest to prosecutors in this state such as to motivate us to add our views to those already so forcibly advocated by others. We refer specifically to the issue whether due process of law requires that in felony prosecutions not initiated by grand jury indictment there is

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4. As used hereafter in this brief the term "misdemeanor" refers to crimes made punishable by imprisonment which does not exceed one year. (See 18 U.S.C. §1; Cal.Pen.Code, §§ 17, 19a.)

a federal constitutional right to a probable cause preliminary hearing held reasonably soon after an arrest for an accused in actual custody.

Whether a probable cause preliminary hearing for an accused in actual custody is required by federal constitutional law in the prosecution of a felony, not initiated by grand jury indictment, is not a matter which we shall discuss herein because by virtue of our State Constitution and statutes the right to such a hearing is afforded any person charged with a felony unless such prosecution is initiated by grand jury indictment.[5]

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5. As used hereafter in this brief, by "probable cause preliminary hearing," "preliminary hearing," or "preliminary examination," we mean a hearing conducted before a judge or magistrate for the purpose of determining whether there is reasonable or probable cause to hold a defendant for trial and that at such hearing the defendant has a right to be present and have the assistance of counsel, to cross-examine witnesses, and to present a defense. The testimony at such a hearing is to be recorded verbatim. See, National Advisory Commission on Criminal Justice Standards and Goals, COURTS (1973), p. 12; Rule 5.1(a) (Preliminary Examination), Federal Rules of Criminal Procedure; Cal. Const., Art. I, § 8; Cal.Pen.Code, §§ 17, subd. (a), 737-739, 858-883, 949; Rule 3.131, Florida Rules of Criminal Procedure. By "felony" we mean a crime which is punishable

(continued on page 25)

We do not wish to be understood as conceding that there is a federal constitutional right to a probable cause preliminary hearing in felony prosecutions (whether or not the accused is in actual custody), because the law of this state provides such a right. Our interest in the instant case is compelled by the declaration by the Court of Appeal for the Fifth Circuit that --

> ". . . except where misdemeanants are out on bond or are charged with violating ordinances carrying no possibility of pretrial incarceration, they must be accorded preliminary hearings.[18] In short, the offense charged is irrelevant to the man incarcerated prior to trial; he must, therefore, be afforded a preliminary hearing regardless of his status as an accused misdemeanant or an accused felon." (Pugh v.

(continued from page 24)
by imprisonment for more than one year. By "probable cause determination" as used in the brief we mean a determination made by a magistrate or judge on the issue of probable cause which can be made ex parte without examination of witnesses.

Rainwater (5th Cir. 1973) 483 F.2d 778, at 789. Fn's. omitted.)[6]

We are strongly opposed to the requirement imposed by the courts below upon the State of Florida that prisoners awaiting trial on misdemeanor charges are entitled to a probable cause preliminary hearing, unless waived. The law of the State of California does not provide for such a hearing in misdemeanor cases and we urge that a right to such a hearing is not required by the United States Constitution. The purpose of this brief is to show why such is the case.

At the outset, assuming only arguendo as we shall do in this brief that there is a federal constitutional right to a probable

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6. In note 18 (438 F.2d at 789) the court, referring to violations of ordinances carrying no possibility of pretrial incarceration, comments: "These offenses, which probably include those referred to by the district court as 'prosecutions of the barking dog variety,' may reasonably be screened by the State Attorney alone at the request of complaining citizens because the defendant in such cases is not confined prior to trial." This may be an appropriate place to note that under California law a defendant may deposit a sum of money instead of giving bail (Cal.Pen.Code, §§ 1295 et seq.) or be released on his own recognizance, subject to certain conditions (Cal.Pen.Code, §§ 1318 et seq.).

cause preliminary hearing in felony cases for persons in actual custody not initiated by grand jury indictment, we shall briefly explain why we urge that equal protection of the laws (U.S. Const., Amend. XIV, § 1) does not require a state to provide prisoners charged with misdemeanors with a right to a preliminary hearing because those charged with a felony are entitled to it.

Initially, we shall summarize the functions of the preliminary hearing in felony cases under California law to better understand our thesis that those charged with misdemeanors are not constitutionally entitled to such a hearing.

We have no doubt that the preliminary hearing provides an appropriate mechanism for determining the legality of a detention of one charged with a public offense while he is awaiting trial and that inquiry into the legality of such detention encompasses a determination of probable cause to answer by a neutral and detached magistrate. (See Kenneth Graham and Leon Letwin, The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations, Part II, 18 U.C.L.A. Law Review 916, at 939-942 (1971).) But the preliminary hearing in felony cases is a right of a defendant under the law of California whether or not he is

in actual custody and hence it is not only an appropriate mechanism for determining the legality of the detention of a prisoner.

Under California law, the magistrate at the preliminary hearing is limited by statute to determining whether or not there is probable cause to believe the defendant guilty of a public offense but "[w]ithin the framework of his limited role, however, the magistrate may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses." (People v. Uhlemann (1973) 9 Cal.3d 662, 667, 511 P.2d 609. Fn. omitted.) However, "[i]t is well established that the defendant at a preliminary examination has the right to examine and cross-examine witnesses for the purpose of overcoming the prosecution's case or establishing an affirmative defense." (Jones v. Superior Court (1971) 4 Cal.3d 660, 667, 483 P.2d 1241.) Additionally, "The preliminary examination is not merely a pretrial hearing, 'The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.' [Citation.]"

(People v. Elliot (1960) 54 Cal.2d 498, 504, 354 P.2d 225.) As Mssrs. Graham and Letwin set forth in their article on preliminary hearings, such hearings have the following functions:

> "a. 'Discovery' of Evidence. This aspect of the preliminary hearing is of more significance to the defense than to the prosecution. It provides the defense with the opportunity to elicit information and evidence in the possession of the prosecution's witnesses." (Ibid., 18 U.C.L.A. Law Review at 920.)
>
> "b. 'Perpetuation' of Evidence. Though defense counsel seldom calls his own witnesses, the perpetuation of testimony, even prosecution testimony, is of importance to him. Not only has he learned what the prospective witnesses have to say, but he 'freezes' their testimony. They may be effectively impeached with their preliminary testimony if it undergoes a metamorphosis by trial; and their preliminary testimony (presumably more favorable to the defense) may then be

qualified as substantive evidence. [¶] The function of perpetuating testimony should be of substantial concern to the prosecutor as well, because of the ever present possibility that an important witness may prove unavailable to testify at trial. . . ." (Id., at 925. Fn. omitted.)

"B. Substitute for Full Trial

[¶] The preliminary hearing is frequently used as a substitute for the full trial. . . . This evidence is used in lieu of viva voce testimony of the witnesses, and in a substantial number of cases no evidence other than the transcript is offered." (Id., at 931.)

"D. Forum for Constitutional Adjudication

. . . . Yet all of our sources and a survey of appellate decisions suggests that the majority of the cases terminated by the preliminary hearing or through the related procedure of a motion to quash the information under Penal Code section 995 are decided on constitutional grounds such as

the inadmissibility of a confession under Miranda or of physical evidence under search-and-seizure doctrines. . . ." (Id., at 942.)7/

For the reasons stated below, it is inappropriate to hold that the equal protection clause requires that a preliminary hearing be held in misdemeanor cases (regardless of whether the defendant is in actual custody or not) just because defendants charged with felonies are entitled to

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7. We note that under Rule 5.1(a), Federal Rules of Criminal Procedure, that "[o]bjections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12." Under California law, a motion to suppress evidence obtained in violation of constitutional provisions relating to searches or seizures may be made at the preliminary hearing (Cal.Pen.Code, § 1538.5, subd. (f)) and if the defendant is held to answer he may move to suppress the evidence in the trial court before trial and, subject to certain limitations, at trial (Cal.Pen.Code, § 1538.5, subd. (i) and subd. (j)). If a state provides for litigating issues relating to illegally obtained evidence at a preliminary hearing in felony cases then does the equal protection clause require the state to allow such a procedure in misdemeanors? -- assuming that such clause requires procedural equality between misdemeanors and felonies?

a preliminary hearing, unless the prosecution is initiated by indictment. That is, the determination by a magistrate, peace officer, or prosecutor that probable cause exists to justify an arrest (with or without a warrant) does not require that the supporting evidence be admissible under the rules of evidence applicable to trials. (See, e.g., Draper v. United States (1959) 358 U.S. 307, 311-312, 3 L.Ed.2d 327, 330-331, 79 S.Ct. 329.) However, in California for example, while the evidence presented in a felony preliminary hearing is required to show that there is probable cause to believe that the offense charged has been committed and that the accused committed the offense it need not be legally sufficient to support a conviction (see Rideout v. Superior Court (1967) 67 Cal.2d 471, 474, 432 P.2d 197), the commitment by the magistrate must be based upon competent evidence, i.e., evidence which would be admissible (unless there is no objection) in a trial on the merits. (See, e.g., People v. Schuber (1945) 71 Cal.App.2d 773, 775, 163 P.2d 498.) The reason for this further requirement needs no elaborate exposition. Given the gravity of the felony offense either by reason of the greater potential punishment or the stigma of the conviction which would

attach and because it is virtually universally conceded that it is appropriate that the time limits for trials after arrest or similar process are longer than in misdemeanor cases then there is a sound public policy which is furthered by the law which requires that the evidence at a preliminary hearing which establishes probable cause be competent. That public policy applicable to preliminary hearings has been established not only in the interest of society but in the interest of an accused charged with a serious offense. The same considerations do not generally apply to misdemeanor prosecutions. If there is a federal constitutional right for prisoners in misdemeanor prosecutions to have a probable cause determination before trial by a magistrate or judge, we submit it does not follow that such a determination requires a preliminary hearing. We shall argue this matter further. It suffices for our purpose at this point to urge that the equal protection clause does not require a preliminary hearing for prisoners charged with misdemeanors simply because state law provides for the right to have a preliminary hearing for those charged with a felony whether or not they are in actual custody. Thus, the National Advisory Commission on Criminal Justice Standards and Goals

recommended that "[p]reliminary hearings should not be available in misdemeanor prosecutions" because:

> "Given the minor penalties that may be assessed for conviction of a misdemeanor, such prosecutions need not involve the complexities of a felony case. This standard suggests methods of simplifying the processing of misdemeanor cases. [¶] Since a misdemeanor trial will occur quickly and its burden is significantly less than that of a felony trial, the Commission believes that the preliminary hearing-and the protection it may afford against an unjustified trial-is not necessary in misdemeanor cases." (COURTS, Standard 4.3 Procedure in Misdemeanor Prosecutions, p. 73.)

Additionally, there is a much greater probability that those charged with misdemeanors will be released on bail or its equivalent or on their own recognizance than those charged with felonies. In misdemeanors, statutes and recommendations by advisory bodies such as the Commission provide for mandatory time limits for which

are substantially shorter in misdemeanor as compared to felony cases. (Ibid., Standard 4.1 Time Frame for Prompt Processing of Criminal Cases, at p. 68: "The period from arrest to the beginning of trial of a felony prosecution generally should not be longer than 60 days. In a misdemeanor prosecution, the period from arrest to trial generally should be 30 days or less.")

Now, if a person charged with a felony is entitled to a preliminary hearing as a matter of right (unless waived or if the prosecution is initiated by grand jury indictment) then it seems to us that it would violate equal protection of the laws if a non-prisoner charged with a misdemeanor would not be entitled to a preliminary hearing because equal protection of the laws requires that a prisoner charged with a misdemeanor is entitled to a preliminary hearing. Given all the advantages of a preliminary hearing other than the determination of probable cause, a non-prisoner would not have those other advantages. Moreover, the prisoner having a preliminary hearing would have available or could procure a transcript of the hearing but a non-prisoner would not. The problem is compounded because it is not required that the testi-

mony at misdemeanor trials to be reported and transcribed verbatim. Thus, a non-prisoner who was tried might be convicted and his punishment might include imprisonment but he would not have a benefit of a transcript - neither of the preliminary hearing nor of the trial. The fall-out from the anomolies suggested by the action by the courts below vis a vis probable cause preliminary hearings for prisoners charged with misdemeanors would be as unpredictable on the "ecology" of the administration of criminal justice as the introduction of some new pesticide might be on the web of life. Finally, the creation of a federal constitutional right to have a preliminary hearing in misdemeanor cases would further delay the time for trial for those in actual custody. The inferior courts would face additional problems relating to congestion of their calendars and the speedy disposition of cases. (Cf., the observations by this Court concerning misdemeanor prosecutions as set forth in Arsensinger v. Hamlin (1972) 407 U.S. 25, 32 L.Ed.2d 530, 536-538, 92 S.Ct. 2006, 2011-2012.)

Having disposed of the contention that equal protection requires that a prisoner charged with a misdemeanor is entitled to a probable cause preliminary hearing, we shall

now turn to the question whether due process of law (including the Fourth Amendment made applicable to the states by virtue of the Fourteenth) requires such a hearing.

III

THE RELIEF GRANTED WITH RESPECT TO PRISONERS AWAITING TRIAL ON MISDEMEANOR CHARGES EXCEEDED THE AUTHORITY OF THE FEDERAL COURTS BELOW BECAUSE SUCH RELIEF REQUIRES MORE OF STATE COURTS AND PROSECUTORS THAN IS REQUIRED BY THE UNITED STATES CONSTITUTION OR FEDERAL LAW GOVERNING MISDEMEANOR PROSECUTIONS

We assume arguendo that there is a federal constitutional right for a prisoner to have a probable cause preliminary hearing before trial in a felony case. Moreover, we shall assume (and we do believe) that there is no federal constitutional right for a person neither in actual nor constructive custody to have a probable cause preliminary hearing in a felony case. That is, we certainly do not think that a felony prosecution cannot be validly initiated by a prosecutor who makes an initial determination of probable cause and that a similar determination need not be made by a magistrate or judge if the accused remains at liberty on his own recognizance. In such a situation, his position is no more different than a witness who is not detained or who have not been released on bail to secure his

appearance. (Cf., Albrecht v. United States (1926) 272 U.S. 1, 71 L.Ed. 505, 47 S.Ct. 250.)

We shall assume arguendo (and only arguendo) in this portion of our brief that in misdemeanor prosecutions a prisoner is entitled to a reasonably early pretrial determination of probable cause to hold him for trial by a neutral and detached magistrate.[8] If we make that assumption, then

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8. By "neutral and detached magistrate," we naturally use that term as it has been explicated by this Court in Shadwick v. City of Tampa (1972) 407 U.S. 345, 32 L.Ed.2d 783, 92 S.Ct. 2119.

We need not discuss in detail some procedural problems which arise under the federal rules if the complaint or information filed against a person in actual custody awaiting trial on a misdemeanor charge is not based upon probable cause, albeit there was evidence which was presented to the magistrate or judge which was offered to show probable cause and an erroneous determination made that such evidence was sufficient. If the issues were raised then it seems clear to us that the accusatory pleading could be "cured" by offering additional evidence in support of probable cause. Of course, if evidence is obtained pursuant to an arrest not supported by probable cause at the time of the arrest, then it follows under the exclusionary rules that such evidence could be suppressed on proper motion. This is, however, a matter quite independent of the

we are satisfied and respectfully submit to this Court that the courts below imposed requirements on the Florida courts and prosecutors which were not compelled by the United States Constitution. Specifically, the basis for our position is that under federal law governing federal misdemeanor prosecutions neither a defendant whose prosecution has been initiated by a complaint (unless an information is filed before the date set for his preliminary examination) nor one whose prosecution has been initiated by an information is entitled to a preliminary hearing even though he is held either in actual or constructive custody awaiting trial. However, any such defendant does have the right to have or have had an ex parte probable cause determination by a judge or magistrate - either as a basis for issuance of any arrest warrant or the filing of a complaint if he has been arrested without a warrant. Therefore, Florida courts and prosecutors are required by the courts below to accord a prisoner charged with a

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(footnote 8 continued)
question whether and how an insufficiency of the evidence in support of a determination of probable cause to hold a defendant for trial can be cured by the submission of supplemental evidence.

misdemeanor more rights than are accorded under federal law to the same class of defendants.

The justification for this position is as follows:

(a) This Court in Costello v. United States (1956) 350 U.S. 359, 100 L.Ed. 397, 76 S.Ct. 406, held that neither the Fifth Amendment's provision making a grand jury indictment a prerequisite of a federal trial for a capital or otherwise infamous crime nor justice nor the concept of a fair trial require that an indictment be open to challenge upon the ground that there was inadequate or incompetent evidence before the grand jury. In so holding, this Court declared:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not

required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." (350 U.S. at 363, 100 L.Ed. at 402-403, 76 S.Ct. at 408.)

(b) However, we must acknowledge that what is not required by the Fifth Amendment may be required by the Fourth, especially in the light of Morrisey v. Brewer (1971) 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 and Gagnon v. Scarpelli (1973) 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756, which set forth the rights of parole and probation violators to a "preliminary hearing" and a "final hearing" prior to the ultimate decision whether the parole or probation, as the case may be, should be revoked.[9]

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9. With respect, we cannot believe that the rules announced in Morrisey and Gagnon were intended to fully apply to persons apprehended for parole or probation violations who are only subject to misdemeanor sentences. Compare, the unqualified right to counsel announcement in criminal cases announced in Gideon v. Wainwright

(c) Under federal law, any offense neither punishable by death nor by imprisonment for a term exceeding one year is a misdemeanor. Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense. (18 U.S.C. § 1.) A misdemeanor may be prosecuted by information which may be filed without leave of court. (Rule 7(a), Federal Rules of Criminal Procedure.) A person arrested under a warrant issued upon a complaint or upon a complaint filed after his arrest "is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of a district court. . . . provided, however, that the preliminary examination shall not be held . . . if an information against the defendant is filed in district court before the date set for the preliminary examination . . . ."

(footnote 9 continued)
(1963) 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, with the qualification that right to counsel applies only when a person charged with a petty offense is to be imprisoned as announced in Argersinger v. Hamlin (1972) 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006.

(Rule 5(c), Federal Rules of Criminal Procedure.) In those cases in which a defendant is not in custody on a complaint which has been filed before or after his arrest, Rule 9(a) provides that "[u]pon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, . . ."

> ". . . . An information may be filed without leave of court and it need not be verified. This is not enough to satisfy the Fourth Amendment if a warrant is requested. In such case the information must be supported by a verified statement of facts from which the court asked to order issuance of the warrant can ascertain if there is probable cause to believe that an offense has been committed and that the defendant has committed it. . . . A complaint is sufficient for issuance of a warrant under Rule 4 though it rests on the complainant's belief, rather than his personal knowledge, so long as the sources of that

> belief are set out and are such as to justify a finding of probable cause. A similar showing should suffice under Rule 9. The standard of probable cause is discussed in connection with Rule 4." (C. Wright, Federal Practice and Procedure: Criminal § 151 p. 341 (1969). Footnotes omitted.)[10]

It is manifestly clear that a warrant shall not issue upon an information simply at the request of the attorney of the government because "[t]he decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant."

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10. The Advisory Committee Note to the proposed amendment to Rule 9(a), approved by this Court, states: "If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause." (62 F.R.D. 274.)

(Whitely v. Warden of Wyoming State Penitentiary (1971) 401 U.S. 560, 564, 28 L.Ed. 2d 306, 311, 91 S.Ct. 1031. Footnotes omitted.)

Rule 4(a) provides that a warrant shall issue if it appears from the complaint or from an affidavit or affidavits filed with the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it. Rule 5(a) provides in part that "[i]f a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause." The proposed amendment to Rule 4 approved by this Court provides in part:

> "The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a summons or warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce. The magistrate shall promptly make or cause to be made a record or summary of such proceeding. . . ." (62 F.R.D. 271)

In view of the foregoing matters, our conclusion that a probable cause preliminary hearing in a misdemeanor prosecution is not required by the United States Constitution is fully justified by the rules in federal prosecutions, such rules having been approved by this Court. If this Court were to conclude otherwise the relevant federal rules governing misdemeanor prosecutions would have to be radically revised.

We have demonstrated how the courts below imposed requirements upon Florida courts and prosecutors which were not required by federal law (having assumed arguendo in this portion of our brief that a defendant in actual custody awaiting trial on a misdemeanor charge is entitled as a matter of automatic right - unless waived - to a probable cause determination). We shall argue in the next portion of the brief that in misdemeanor cases the United States Constitution does not require that the determination of probable cause be made if within a reasonable time after his arrest, either (1) the prisoner will be tried or (2) the issue of probable cause to hold him in custody pending trial can be determined in a hearing on a motion to suppress illegally obtained evidence when the issue in question would be concomitantly resolved.

IV

THE LAW IN CALIFORNIA PROVIDES AMPLE PROTECTION FOR A DEFENDANT IN ACTUAL CUSTODY AWAITING TRIAL ON MISDEMEANOR CHARGES WITH RESPECT TO THE RIGHT TO HAVE A PROBABLE CAUSE DETERMINATION BY A MAGISTRATE OR JUDGE AND IS OTHERWISE CONSISTENT WITH DUE PROCESS OF LAW WITHOUT THE IMPOSITION OF A REQUIREMENT THAT THERE BE A PRETRIAL PROBABLE CAUSE PRELIMINARY HEARING OR AN AUTOMATIC PRETRIAL PROBABLE CAUSE DETERMINATION UNLESS WAIVED

We have discussed the question whether the Constitution requires a probable cause preliminary hearing in misdemeanor cases of defendants awaiting trial while in actual custody. Our conclusion was that the Constitution does not require a pretrial probable cause preliminary hearing in misdemeanor cases. That discussion assumed arguendo that a defendant in actual custody awaiting trial is automatically entitled to have a pretrial probable cause determination without demand.

In the following discussion we discard, as it were, this previously asserted assumption. The position which we urge is that

there is not even an automatic right to a pretrial probable cause determination by a magistrate or judge (without a preliminary hearing). Our position is that there is a right to such a determination by a person in custody only upon demand and only when an accused in actual custody has neither been tried nor had a hearing on a motion to suppress evidence in which the probable cause issue can be determined within a reasonable period after arrest.

We have already averted in Argument I to the right, under the law of California, of a person arrested on a misdemeanor charge to be taken without unnecessary delay before a magistrate and to be speedily arraigned and tried within thirty days thereafter (unless a continuance is granted for good cause). Additionally, the California Supreme Court declared in People v. Powell (1967) 67 Cal.2d 32, 60, 429 P.2d 137, that:

> "The principal purposes of the requirement of prompt arraignment are . . . to place the issue of probable cause for the arrest before a judicial officer, to provide the defendant with full advice as to his rights and an opportunity to have counsel

appointed and to enable him to apply for bail or for habeas corpus when necessary."

Since Powell was decided in 1967 we are unaware of any reported decision by California appellate courts which have further considered the California Supreme Court's declaration that a prompt arraignment serves the purpose of placing the issue of probable cause for the arrest before a judicial officer or provides the defendant with an opportunity to apply for habeas corpus when necessary. The absence of such reported cases is not without significance. In view of the absence of reported cases which have appeared since Powell which are relevant to the instant proceeding, it is apparent that the procedures presently available in California are adequate means to protect the rights of all persons accused of misdemeanors, whether or not in custody, without either a preliminary hearing or an automatic probable cause determination. This view is fully supported by the following considerations.

First, it should be noted that Powell does not mandate that the prompt arraignment requires the magistrate to make a probable cause determination as a matter of right (unless waived). It merely refers to the prompt arraignment as providing an

opportunity for raising the issue. Second, the Powell declaration does not imply that the issue of probable cause if raised must be determined at the arraignment. Third, the absence of reported cases elucidating the Powell declaration with respect to incarcerated defendants awaiting trial on misdemeanor charges is easily explainable by the structure of the law with respect to misdemeanors.[11/] This structure of laws providing for defendants' rights with respect to misdemeanors obviates the need for either (1) probable cause preliminary hearings or (2) probable cause determinations before a speedy trial as a matter of right (unless waived).

In California, prior to trial the defendant (usually through his counsel) has the right to discover his statements and those made by expected prosecution witnesses. Since it is up to the defendant to raise the illegality of the arrest and also, as we

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11. The "structure" of California law which provides for procedural rights for a defendant charged with a misdemeanor is set forth in an appendix to this brief. We have summarized the relevant procedural rules for the convenience of this court in the appendix so that we will not burden this Court with matter in the brief proper which would disrupt the continuity of our argument.

view it, the issue whether there is probable cause to believe he has committed the offense charged, it seems to be a likely exercise in futility to schedule a probable cause preliminary hearing or other proceeding if the defendant by inspection of statements of prosecution witnesses can conclude that probable cause for holding him for trial exists. Moreover, the defendant has a right to have a pretrial hearing on a motion to suppress evidence obtained in violation of constitutional provisions pertaining to searches or seizures at which, it will frequently be the case, the probable cause to hold him for trial issue is inextricably related. In the ordinary course of events, by the time defendant (or his counsel) has examined the evidence made available by the prosecutor, noticed a motion for a probable cause determination, and a hearing or proceeding has been scheduled, the trial or pretrial hearing on a motion to suppress evidence unlawfully obtained would shortly be had anyway.

A defendant held for trial who has been arrested pursuant to a warrant has already had the benefit of a neutral and detached magistrate ruling upon the issue of probable cause. This ruling was made ex parte upon the basis of an affidavit or

affidavits, the magistrate having the discretion to examine the affiant or other persons. It seems to us anomolous that a person arrested without a warrant must be given a right (unless waived) to have a probable cause preliminary hearing at which he (and his counsel, if any) can be present, witnesses examined and cross-examined, the opportunity to present evidence in rebuttal, and the recording of the evidence taken. At most, we contend that a person arrested without a warrant or a warrant not supported by probable cause should be entitled to a probable cause determination upon demand only after raising the issue and that the determination by the court or magistrate can be made ex parte upon the basis for an affidavit or affidavits setting forth the probable cause.

We do not think it desirable to establish a constitutionally required policy to have probable cause determinations upon demand in advance of a trial which will take place within a reasonable time after arrest because the calendaring of such matters would tend, in all likelihood, to cause further congestion in inferior courts and likely generate many otherwise unnecessary continuances.

Among the reasons for the absence of complaints is that the presumption that arrests without warrant are lawful until the issue has been timely raised is well justified. With respect to arrests based upon probable cause for felonies not committed in the presence of the arresting officer, citations to cases are not necessary to establish what a mine field an officer must traverse in order to insure that he does have probable cause to arrest and legal grounds to enter a structure to make an arrest. However, in the overwhelming majority of misdemeanor cases, warrantless arrests are made based upon probable cause that the defendant committed the offense in the presence of the officer. In our opinion, it is relatively a rare case (quite apart as to the question whether a conviction can be obtained) in which the arresting officer did not have probable cause to believe an offense was committed in his presence.[12/] In California, the

12. There are exceptions. A defendant may be arrested for a felony based upon probable cause but for some reason he is only charged with a misdemeanor. In some cases the probable cause concerning the misdemeanor is established at the felony preliminary hearing. In other cases the prosecutor may choose to file a misdemeanor complaint. It is our opinion that such cases constitute a substantial but minor portion of the cases prosecuted as misdemeanors.

filing of the complaint must be with the approval of a prosecutor and thus serves as a check upon arrests made by peace officers or private persons.

It is for these reasons why we think that the probable cause issue has a true and a false side to it. The false side arises because it appears that in Florida it was the common practice to defer arraignment of persons in actual custody for more than a substantial time and that the time for trial would be correspondingly deferred. By contrast, we are unaware that such delays that have been formerly common in Florida takes place in California on a scale such as to provoke the expression of grievances in news media or learned journals.

Our discussion has not explored all the contingencies which can arise which require consideration. For example, while we urge that a trial or a hearing on a motion to suppress evidence within thirty days (approximately) of the arrest provides an adequate substitute for a probable cause preliminary hearing, the question of a probable cause determination may become "real" if the case is continued for trial or for a hearing on a motion to suppress beyond a reasonable time. In any event, the remedy is not dismissal. Possibilities

include: (1) release of the defendant on his own recognizance as being constitutionally compelled in appropriate cases; (2) a probable cause determination upon demand and after a noticed motion, such determination being made ex parte by a magistrate or judge upon affidavit or affidavits; (3) denial of a continuance if the prosecution has not or is unable to make a sufficient showing of probable cause; or (4) dismissal of the action if the prosecution has not or is unable to make a sufficient showing of probable cause. We mention such possibilities only to show how the several states could where necessary develop rules in accord with their procedures.

Finally, the position we have taken herein that there is no federal constitutional right to an automatic pretrial probable cause determination by a magistrate (unless waived) in misdemeanor cases appears to be supported by Rule 12(b)(2), Federal Rules of Criminal Procedure, namely that "[d]efenses and objections based on defects in the institution of the prosecution . . . may be raised only by motion before trial" and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." As this Court

explained in Davis v. United States (1973) 411 U.S. 233, 36 L.Ed.2d 216, 221, 93 S.Ct. 1577, 1580: "By its terms it applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction thereof."[13/] Thus, it is clear that the federal rules envision the defendant as having to raise the issue of probable cause with respect to informations. If our position is not upheld by this Court we find it difficult to see how federal rules are not in need of radical revision.

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13. Rule 12(b)(4) provides that "[a] motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct." See also the proposed amendment to Rule 12, as approved by this court, and Advisory Committee Note on proposed subdivision (e) (62 F.R.D. 287, 291), and the Advisory Committee Note on the proposed amended version of Rule 9 that "a defendant can, at a proper time, challenge an information issued without probable cause" in cases in which an arrest warrant is issued on an information (62 F.R.D. 274).

V

THE REQUIREMENT THAT PROBABLE CAUSE PRELIMINARY HEARINGS ARE REQUIRED FOR MISDEMEANORS CONSTITUTES IMPROPER SUPERVISION OF THE ADMINISTRATION OF CRIMINAL JUSTICE OVER STATE COURTS BY FEDERAL COURTS

Up until this point, we have avoided discussion of the procedural question whether a United States District Court Judge had jurisdiction to interfere by declaratory and injunctive action with duly constituted state criminal proceedings on the question of probable cause preliminary hearings. It had been sufficient for our purposes to discuss the merits. However, in view of the positions adopted and advocated in this brief it becomes clear that the relief provided by the courts below goes far beyond what is constitutionally required. Indeed, in considering what is constitutionally required it is not inappropriate to bear in mind the reasons for the long standing public policy against federal court interference with state court proceedings. Such reasons have been expounded fully in Younger v. Harris (1971) 401 U.S. 37, 43-50, 27 L.Ed.2d 669, 675-679, 91 S.Ct. 746, and its companion cases.

The principle of federalism is not one of expediency but of constitutional dimension. If not vindicated by this Court, that fundamental principle will become

> ". . . but a walking shadow, a
> poor player
> That struts and frets his hour
> upon the stage
> And then is heard no more: it
> is a tale
> Told by an idiot, full of sound
> and fury,
> Signifying nothing." (William
> Shakespeare, Macbeth, Act V,
> Scene 5, lines 24-28.)

The same policy and constitutional considerations which limit the availability of injunctive and declaratory relief by federal courts with respect to state court proceedings as considered in Younger v. Harris (and its companion cases) is exhibited in other ways. The decisions by this Court, which fashioned exclusionary rules inherently or existentionally implied by federal constitutional provisions with respect to illegally obtained evidence, "established no assumption by this Court of supervisory authority over state courts, . . . and, consequently, it implied no total obliteration of state laws relating

to arrests and searches in favor of federal law. Mapp [v. Ohio (1961) 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684] sounded no death knell for our federalism; rather it echoed the sentiment of Elkins v. United States, supra (364 at 221) that 'a healthy federalism depends upon the avoidance of needless conflict between state and federal courts' by itself urging that '[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches.' 367 U.S., at 658. (Emphasis added.)" (Ker v. California (1963) 374 U.S. 23, 31, 10 L.Ed.2d 726, 736, 83 S.Ct. 1623.) We cannot see how the courts below have respected the same fundamental criteria relating to any constitutional requirement concerning probable cause to detain a prisoner for trial since they have imposed upon the State of Florida procedural rules which are not compelled by the Constitution and which are, moreover, more stringent than those rules applicable to federal courts, magistrates, and prosecutors.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court disapprove so much of the relief granted by the court below which requires that persons in actual custody on misdemeanor charges be accorded a probable cause preliminary hearing.

Respectfully submitted,

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APPENDIX

SUMMARY OF CALIFORNIA PROCEDURAL RULES RELEVANT TO THE ISSUE OF WHETHER A DEFENDANT AWAITING TRIAL IN A MISDEMEANOR PROSECUTION WHILE IN ACTUAL CUSTODY IS ACCORDED DUE PROCESS OF LAW

(a) Every person arrested with or without a warrant must be taken before a magistrate without unnecessary delay, and in any event within two days after his arrest excluding Sundays and holidays. (People v. Powell, supra; Cal. Pen. Code, §§ 825, 847, 849.)

(b) When an arrest is made without a warrant, a complaint stating the charge against the arrested person must be laid before such magistrate. (Pen. Code, § 849.)

(c) An arrest with or without a warrant by either a peace officer or private person must be supported by probable cause. (U.S. Const., Amend. IV; Cal.Const., Art. I, § 19; Giordenello v. United States (1958) 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245; Barnes v. Texas (1965) 380 U.S. 253, 13 L.Ed.2d 818, 85 S.Ct. 942; People v. Sesslin (1968) 68 Cal.2d 418, 439 P.2d 321.)

(d) By statute, an arrest without a warrant by a peace office of a person for

a misdemeanor or an infraction must be based upon reasonable cause to believe that the person to be arrested has committed a public offense in the officer's presence. (Cal.Pen.Code, § 836.) An arrest for a misdemeanor or infraction by a private person is lawful only "[f]or a public offense committed or attempted in his presence." (Cal.Pen.Code, § 837.) The only noteworthy exception is that a peace officer may make a warrantless arrest of a "person involved in a traffic accident when the officer has reasonable cause to believe that such person had been driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug." (Cal. Veh.Code, § 40300.5.)

(e) Any peace office may release from custody, instead of taken such person before a magistrate, any person arrested without a warrant whenever he is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested. (Cal.Pen.Code, § 849, subd. (b)(1).)

(f) "It is presumed that official duty has been regularly performed. This presumption does not apply to an issue as to the lawfulness of an arrest if it is

found or otherwise established that the arrest was made without a warrant." (Cal. Evid.Code, § 664.) "In the absence of evidence to the contrary, it is presumed that the officers acted legally. . . . When, however, the question of the legality of an arrest or of a search and seizure is raised . . . , the defendant makes a prima facie case when he establishes that an arrest was made without a warrant or that private premises were entered or a search made without a search warrant, and the burden then rests on the prosecution to show proper justification." (Badillo v. Superior Court (1956) 46 Cal.2d 269, 272; 294 P.2d 23.)

(g) Misdemeanor criminal complaints filed by a private citizen without the district attorney's authorization are nullities and the court lacks jurisdiction to act except to dismiss them. (People v. Municipal Court (1972) 27 Cal.App.3d 193, 103 Cal.Rptr. 645.)

(h) A misdemeanor prosecution, except when otherwise provided by law (e.g., written promises to appear executed by persons who are not detained in custody when a citation is issued) is commenced by the filing of a verified complaint. (Cal. Pen.Code, §§ 740, 853.5-853.8, 949, 959.)

There is no requirement that the complaint be supported by an affidavit (or declaration under penalty of perjury) unless a warrant is to be issued. (Cal.Pen.Code, § 147, subd. (b).)

(i) A complaint stating the charge against a person arrested without a warrant shall be laid before the magistrate when the arrested person is taken before the magistrate without unnecessary delay following the arrest. (Cal.Pen.Code, § 849.)

(j) At the arraignment, the defendant may place the issue of probable cause for the arrest before a judicial officer and is provided with full advice as to his rights and an opportunity to have counsel appointed and is enabled to apply for bail or for habeas corpus when necessary. (People v. Powell, supra, 67 Cal.2d at 60.)

(k) "If on the arraignment, the defendant requires it, he must be allowed a reasonable time to answer, which shall be . . . not more than seven days for an offense originally triable in an inferior court." (Cal.Pen.Code, § 990.)

(l) The arraignment of a defendant is not complete until a plea is entered. (People v. Terry (1970)14 Cal.App.3d Supp. 1, 92 Cal.Rptr. 479.)

(m) "In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the assistance of counsel. If he desires and is unable to employ counsel the court shall assign counsel to defend him." (Cal.Pen.Code, § 987, subd. (a).)[1/]

N.B. "Crimes and public offenses include: . . . 3. Infractions." (Cal.Pen.Code, § 16.) "An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him unless he is arrested and not released on his written

1/ Of course, a defendant who is unable or unwilling to post bail is most frequently unlikely to afford private counsel and therefore the court would appoint counsel for him at public expense, unless he validly waives his right to counsel.

promise to appear, his own recognizance, or a deposit of bail." (Cal.Pen.Code § 19(c).)

(n) As a general rule, a defendant in a criminal case may, for purposes of impeachment, inspect the statements or recorded conversations of any witness whom the prosecution intends to call at trial. This rule includes the statements of one's codefendants in a joint trial. He is also entitled to inspect before trial any record of statements made by him, whether or not they are otherwise admissible into evidence. (See, e.g. Joe Z. v. Superior Court (1970) 3 Cal.3d 797, 801-806, 478 P.2d 26; Witkin, CALIFORNIA EVIDENCE (2d Ed. with 1972 supplement), §§ 1055 et seq.,)

(o) The initial burden of raising the issue of the illegality of an arrest for the purpose of moving to suppress evidence rests upon the defendant. (People v. Carson (1970) 4 Cal.App.3d 782, 786, 84 Cal.Rptr. 699.)

(p) A motion to suppress evidence must be made and heard prior to trial at a special hearing, unless prior to trial opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion. (Cal.Pen.Code, § 1538.5, subd. (g) and subd. (h).)

(q) If a motion to suppress evidence under Penal Code section 1538.5 is granted at a pretrial special hearing and the prosecution acknowledges it cannot proceed to trial without the suppressed evidence, the court in its discretion may dismiss the case on its own motion. (Cal. Pen. Code, §§ 1538.5; 1385; 1238, subd. (a)(7).)[2/]

(r) If a defendant's motion to suppress evidence is granted under Penal Code section 1538.5, and the case is dismissed pursuant to section 1385 or the people appeal in a misdemeanor case as authorized by section 1538.5, subdivision (j), the defendant shall be released on his own recognizance if it appears that he will surrender himself to custody as agreed if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully

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2. While our opinion is that the overwhelming majority of misdemeanor cases arise by arrests by peace officers, § 1538.5 is only limited to motions to suppress evidence obtained in violation of constitutional provisions relating to searches and seizures. Thus, we must acknowledge that there may be a significant number of cases, albeit a minority, where the issue of probable cause to hold a defendant for trial would not be reached by a pretrial motion to suppress evidence.

ordered by the court to be resumed to custody. (Cal.Pen.Code, §§ 1318, 1538.5, subd. (k).)

(s) "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: . . . .3. Regardless of when the complaint is filed, when a defendant in a misdemeanor case in an inferior court is not brought to trial within 30 days after he is arraigned if he is in custody at the time of arraignment, . . ." (Cal. Pen.Code, § 1382.)

Supreme Court, U. S.
FILED
AUG 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

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BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Florida is reported at 332 F.Supp. 1107 (S.D. Fla. 1971). The Order adopting a plan to implement the original opinion is reported

at 336 F.Supp. 490 (S.D. Fla. 1972). The District Court findings, requested by the Court of Appeals after oral argument are reported at 355 F.Supp. 1286 (S.D. Fla. 1973). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 483 F.2d 778 (5th Cir. 1973).

PRELIMINARY STATEMENT

Comes now the State of Georgia, by and through its Attorney General, by invitation of this Court, and files its brief *Amicus Curiae* in the above-styled cause on behalf of Petitioner.

Amicus adopts *in toto* the position taken by Petitioner in the brief heretofore filed in this Court, and in addition thereto submits that the cause should be reversed for the reasons stated hereinafter.

QUESTION PRESENTED

Is there a constitutional requirement that shortly after a state has arrested an individual that he be taken before a detached magistrate for a determination of whether there is probable cause to hold that person for trial?

ARGUMENT

The United States Court of Appeals as well as the District Court, held that the Fourth and Fourteenth Amendments affirmatively require that arrestees held for trial upon information filed by the Florida State Attorney must be provided with a preliminary hearing before a judicial officer without unnecessary delay. These courts in effect declared Rule 3.131(a), Florida

Rules of Criminal Procedure,[1] unconstitutional, inasmuch as said Rule dispenses with preliminary hearings as to a defendant charged by an information or indictment.

Presented to this Court for consideration on a first impression basis is the issue of whether or not the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment requires a state to assume the burden of providing some sort of pretrial custodial determination before a detached individual within the meaning of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) and *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), after an individual has been incarcerated in order to determine whether or not there is probable cause to continue detaining that individual for trial. This issue brings into full circle a discussion of all of the possibilities under which one may or may not be entitled to a preliminary hearing.

It is well settled that the denial of a preliminary hearing after one has been indicted is not a denial of due process, inasmuch as the indictment has taken the place of a preliminary hearing and has furnished a basis for finding probable cause to detain an individual for trial.[2] *Jaben v. United States*, 381 U.S. 214 (1965); *United States v. Myers*, 303 F.Supp. 1583 (D.D.C. 1969); *United States v. Farries*, 459 F.2d 1057 (3rd Cir. 1972), *cert. denied*, 409 U.S. 888, 410 U.S. 912 (1973). Further, it has been consistently held that the purpose of a preliminary hearing is not designed to be a discovery tool but to determine whether or not prob-

[1] Amicus will cite whenever appropriate, those corollary Georgia statutory provisions similar to the ones available to a criminally accused in Florida.

[2] *United States v. Eley*, 335 F.Supp. 353 (N.D. Ga. 1972).

able cause exists.[3] *United States v. Habig*, 474 F.2d 55 (10th Cir. 1973), *cert. denied*, 412 U.S. 941 (1973). *United States v. Conway*, 415 F.2d 158 (3rd Cir. 1969), *cert. denied*, 397 U.S. 994 (1970). It has also been held that the denial of a preliminary hearing does not deny one his right to confrontation. *Goldsby v. United States*, 160 U.S. 80 (1895). In addition, the constitution does not require a preliminary hearing before removal of an accused person for trial to a federal court having jurisdiction of the charge. *United States Ex Rel. Hughes v. Gault, Marshal*, 271 U.S. 142 (1926). However, in *Coleman v. Alabama*, 399 U.S. 1 (1970) this Court found that a preliminary hearing in Alabama was a key stage in their criminal prosecution, and as such an accused was entitled to be represented by counsel at such a hearing.

Also, there is no constitutional right to a preliminary hearing prior to indictment or prior to trial. *Goldsby v. United States*, 160 U.S. 80 (1895). This Court has also stated that there is no constitutional requirement that the state must provide a judicial determination as to probable cause to arrest prior to arresting one on information. *Lem Woom v. Oregon*, 234 U.S. 91 (1914); *Beck v. Washington*, 369 U.S. 541 (1962). Neither is it constitutionally impermissible to try an individual on information without seeking an indictment. *Hurtado v. California*, 110 U.S. 516 (1884).

What is being asked of this Court is that they declare that subsequent to an arrest and incarceration a state must as a constitutional prerequisite assume a burden of establishing probable cause to hold an individual for

[3] *Jackson v. State*, 225 Ga. 39 (1969); *cert. den.*, 399 U.S. 934 (1970).

trial on either an information or otherwise prior to indictment. One can also assume from Respondent's position that even if the constitution required that such a preliminary hearing would be available on request by an arrestee that this would not satisfy Respondent's constitutional contentions. Further, it would seem that Respondent takes the position that even in cases upon which one has been arrested pursuant to a warrant, the issuance of that warrant before an impartial magistrate does not satisfy the requisite of a probable cause determination.

To categorically state that under the due process clause of the Fourteenth Amendment a state must immediately conduct upon arrest and incarceration of an individual a probable cause hearing amounts to judicially amending the Constitution. Clearly, the lack of such a procedure is not violative of due process inasmuch as the United States Constitution provides a number of other remedies available to an accused designed to prevent any prolonged or oppressive periods of pretrial confinement. First of all, there is the right of an accused under the Sixth Amendment to a speedy trial. Second, an accused may test the pretrial restraint on his liberty by bringing a writ of habeas corpus as set forth in Art. I, § 9, United States Constitution. Third, the right of an accused to obtain pretrial liberty is protected by the Seventh Amendment which prohibits the use of excessive bail. These constitutional procedural safeguards which are available to an accused do not require a further due process requirement of the preliminary hearing where an accused is charged by an information.

In addition to the basic constitutional rights, the State of Florida has also instituted a number of statu-

tory procedural safeguards to prevent there being any protracted delays in getting an individual to trial. These provisions are as follows: Florida's mandatory speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure;[4] Florida's first appearance hearing within 24 hours of arrest, Rule 3.130(b) (1), Florida Rules of Criminal Procedure;[5] the right to bail under Rule 3.130(b) (4), Florida Rules of Criminal Procedure;[6] and further, Florida has provided an accused with comprehensive rules of pretrial discovery. (cit. omitted). The State of Georgia by statute and constitutional enactment has also instituted certain procedural safeguards as mentioned in the previous footnotes. In addition to those mentioned is the right of an individual to file a writ of habeas corpus.[7]

The language of this Court in *Coleman v. Alabama*, 399 U.S. 1 (1970), seems to further buttress Petitioner's position that a preliminary hearing is not constitutionally required of a State. In *Coleman, supra*, a preliminary hearing was not a required step in an Alabama prosecution, as a prosecutor could directly seek an indictment by grand jury without having a preliminary hearing. *Id.* 8. Further, Justice White in his concurring opinion lends additional credence to Petitioner's position when he stated in *Coleman, supra*, "Our ruling may also invite eliminating a preliminary hearing system entirely." *Id.* at 8.

In passing, the Federal Rules of Criminal Procedure

[4] Corollary Georgia provision: Ga. Const. Art. I, Sec. 2-105; Ga. Code § 27-1901.

[5] A similar Georgia statute: Ga. Laws 1956, p. 796, 797; Ga. Code Ann. § 27-210.

[6] Ga. Const. Art. I, Sec. 2-109; Ga. Code Ann. § 27-901.

[7] Ga. Const. Art. I, Sec. 2-111; Ga. Code Ann. § 50-101.

regarding preliminary hearings needs to be commented upon briefly. Rule 5, Subsection (c) of the Federal Rules of Criminal Procedure does not require that a preliminary hearing be held when information is filed against the defendant in a district court under Rule 7(a), Federal Rules of Criminal Procedure. Further, Title 18, U.S.C. § 3060(e) provides as follows:

> "No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition or release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) and indictment is returned or, in appropriate cases, and information is filed against such person in accord of the United States." [8]

Rule 7, subsection (a) of the Federal Rules of Criminal Procedure, provides for use of either information or indictment. A similar Georgia statute parallels this Federal Rule.[9]

There have been a number of federal circuits which have construed 18 U.S.C. § 3060 (b) and (c) to mean that the Constitution does not require preliminary hearings, and a subsequent conviction without a preliminary hearing will not be vitiated. *Sciortino v. Zampano*, 385 F.2d 132 (2nd Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); *U.S. v. Farries*, 459 F.2d 1057 (3rd

[8] *United States v. Coley*, 441 F.2d 1299 (5th Cir. 1971), *cert. denied*, 404 U.S. 867 (1971).

[9] Ga. Code Ann. § 27-704; *Webb v. Hensley*, 209 Ga. 447, 74 S.E.2d 7 (1953); *Robertson v. Balkcom*, 212 Ga. 605, 94 S.E.2d 720 (1956).

Cir. 1972), *cert. denied*, 409 U.S. 888 (1972); *U.S. v. Anderson*, 481 F.2d 685 (4th Cir. 1973); *U.S. v. Rogers*, 455 F.2d 407 (5th Cir. 1972); *U.S. v. Coley*, 441 F.2d 1299 (5th Cir. 1971), *cert. denied*, 404 U.S. 867 (1971).[10] See also *U.S. v. Heideman*, 21 F.R.D. 335 (1958), aff'd 259 F.2d 943, *cert. denied*, 359 U.S. 959 (1959).

The United States Constitution as adopted did not contain any guarantee of indictment by grand jury, but the Fifth Amendment cured this hiatus. This provision, however, only applies to offenses against the United States and does not require a State to use an indictment for violations of state laws. *Rivera v. Government of Virgin Islands*, 375 F.2d 988 (3rd Cir. 1967).

In a Sixth Circuit decision arising out of Tennessee, the circuit court upheld a Tennessee statute which denied an accused a right to a preliminary hearing when a grand jury was in session, and further stated that such a provision was not unconstitutional as an accused has no right to a preliminary hearing before indictment. *Dillard v. Bomar*, 342 F.2d 789 (6th Cir. 1965). In a case arising out of the Virgin Islands, *Rivera v. Government of Virgin Islands*, 375 F.2d 988 (3rd Cir. 1967), a Virgin Island statute, 5 V.I.C. § 3581(a) does away with indictments and provides as follows, "every felony and every criminal action in the district court shall be prosecuted by information."

The Third Circuit decision stated that there was no constitutional right to a prosecution founded upon a grand jury indictment, and further found this territorial

[10] Georgia cases similarly holding that there is not constitutional right to a preliminary hearing are: *Johnson v. State*, 215 Ga. 839, 114 S.E.2d 35 (1960); *Shields v. State*, 126 Ga. App. 544, 191 S.E. 2d 448 (1972).

statutory provision to be constitutional. The court in *Rivera* also stated that the due process clause did apply to the Virgin Islands, and that this particular statute did not infringe upon due process. This circuit court stated that a preliminary hearing was not required, and further, that a preliminary hearing is a procedural right and not a right within the constitutional concept of due process; and as such can be cut off by the filing of either an indictment or information. See also, *Government of Virgin Islands v. Bolones*, 427 F.2d 1135 (3rd Cir. 1970).

Therefore, if a state can either bypass a preliminary hearing by going directly to an indictment, or as in *Hurtado v. California*, 110 U.S. 516 (1884) and *Lem Woom v. Oregon*, 234 U.S. 91 (1914), by proceeding directly by means of an information, there would seemingly be no constitutional mandate that would require a state to provide an accused with a preliminary hearing. While preliminary hearings are a good idea, they certainly are not constitutional requirements.

Respondents initially sought a judicial hearing to determine probable cause for their detention. When this was denied they took their complaint to the district court. *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D. Fla. 1971). Inasmuch as Respondents were dissatisfied with the Florida criminal procedure, the rule set down in *Younger v. Harris*, 404 U.S. 37 (1970), would seem to be applicable to this situation. Specifically, that the federal courts will not enjoin a pending state criminal prosecution except under certain extraordinary circumstances where there is the danger of irreparable loss and great harm. *Id.* at 43-45. In view of the procedural safeguards instituted by Florida in addition to those

set down in the United States Constitution, there would seemingly be no irreparable loss to Respondents. Respondents argue that principles of *Grannis v. Ordean*, 234 U.S. 385, 395 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) are applicable, and that a denial of a preliminary hearing amounts to a denial of their right to be heard at a meaningful time. This contention would seem to lack any meaningful significance in view of *Goldsby v. U.S.*, 160 U.S. 70 (1895), which states that the denial of a preliminary hearing does not deny one his right to confrontation and cross-examination. Further, in view of the fact that Florida provides those who are arrested with the right to bail[11] and a right to a speedy trial[12], an accused in that state is afforded with more than the minimal due process requirements.

[11] Rule 3.130(b) (4), Florida Rules of Criminal Procedure.
[12] Rule 3.191, Florida Rules of Criminal Procedure.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to reverse the holding of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard L. Chambers, one of the counsel for *Amicus Curiae*, and a member of the Bar of the Supreme Court of the United States hereby certify that on this _____ day of August, 1974, I served a copy of the Brief of *Amicus Curiae* on

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RICHARD L. CHAMBERS

Supreme Court, U. S.
FILED
AUG 7 1974
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Supreme Court of the United States

OCTOBER TERM, 1974.

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AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND
THOMAS TURNER AND GARY FAULK,
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AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of the Commonwealth of Massachusetts as Amicus Curiae.

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October Term, 1954.

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Brief of the Commonwealth of Massachusetts as AMICUS CURIAE.

Interest of Amicus Curiae.

Although the Commonwealth of Massachusetts does not initiate criminal proceedings by information, the Commonwealth files this brief as *amicus curiae* in compliance with the request of the Court.

Summary of Argument.

I. The Constitution was adopted as a federal system in response to the failure of the Articles of Confederation. The defenders of the Constitution specifically noted that the Constitution was a compromise document, providing not for a consolidated national government, but, rather, for a system of "coequal sovereignties" under which the states would be allowed sovereignty in areas particularly inappropriate to the national government.

This Court has long recognized the compromise which resulted in the adoption of the Constitution. The Supreme Court has embraced "Our Federalism" and has delineated specific doctrines to avoid federal encroachment in matters peculiarly appropriate to state decision. The doctrines have been described under the broad label of "Abstention" but the "Abstention Doctrines" are many and varied. The particular doctrine applicable to the instant case is the doctrine of "Equitable Restraint."

The doctrine of equitable restraint, as articulated in a series of decisions culminating in *Younger* v. *Harris*, 401 U.S. 37 (1971), means basically that the federal courts should refuse to intervene in pending state criminal proceedings when the state courts provide an adequate vehicle for the presentation of federal claims. Since notions of federal-state comity interact with traditional equity requirements, the doctrine of equitable restraint requires the

federal courts to consider the state's interest in making a state decision on the question as well as the potential of irreparable harm to the state defendant.

In the instant case, the State of Florida has a pending criminal proceeding against the respondents. Further it would appear that Florida provides a vehicle for the respondent to assert the federal constitutional claim, the courts below were in error when they issued injunctive and declaratory relief.

II. Preliminary probable cause hearings for defendants held in state custody are not required by the Fourth and Fourteenth Amendments to the United States Constitution where prosecution is initiated either by information or indictment.

This Court having held that prosecution by information is constitutionally permissible and having treated informations as comparable to indictment, the lower court has erred in applying probable cause standards required in prosecutions upon complaint to prosecutions by informations.

The sworn information, like the indictment, sufficiently complies with the Fourth Amendment requirement that probable cause must be shown before a warrant shall issue.

Argument.

I. The Concept of Federalism and the Doctrine of Equitable Restraint Require that the Federal Courts Defer to the Courts of the State of Florida in the Presentation of the Respondents' Claim. Younger v. Harris, 401 U.S. 37 (1971), and the Cases Decided under its Principles Bar Respondents' Claim.

The difficulty in defining the proper roles of the state and federal systems is a problem that has been present in the American concept of the function of its governments since

the adoption of the Articles of Confederation. In *The Federalist,* Nos. 18, 19, and 20, James Madison and Alexander Hamilton sketched an analysis of the historical failure of confederacies. In *The Federalist,* No. 20, they wrote that the lesson of history was ". . . that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." Neither Madison nor Hamilton perceived a federal government coextensive with a great part of the North American continent. They could not have imagined a federal union encompassing fifty states, nor the complexity such a union inherently portended. The Constitution they drafted was designed to cure the defects of the Articles of Confederation by creating a viable central government strong enough to secure the national interest. That the creation of such a national government would inevitably diminish local power was obvious, but, in the eighteenth century, the question was more confusing because the issues were so novel.

When Madison defended his constitution he was defending a conception of government which was revolutionary, not only in terms of the individual's relation to the state, but also with respect to the juxtaposition of power the Constitution established. Hamilton, Jay, Madison, and the Federalist members of the Constitutional Convention articulated a system of government which was virtually incomprehensible to the eighteenth century political mind. This school of thought, which it is convenient to call Antifederalist, saw the question of federal and state power as one of either consolidation or confederation. Wood, *The Creation of the American Republic, 1776-1787* (1969) (hereinafter cited as Wood).[1]

[1] The quotations which appear in the following paragraphs are, except where specifically noted, taken from Gordon S. Wood, *The Creation of the American Republic, 1776-1787,* University of North Carolina Press, 1969. Professor Wood's work is a survey of the Articles of Confederation, the making of the Constitution, and, in general, political thought from the Revolution to the Constitution. All quotations are from what the author designates as primary sources, *e.g.,* Jonathan Eliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution.* (Washington, 1854). See Wood, *supra,* 619-620 (A Note on Sources).

The quotations are not intended to be a definitive historical analysis but are cited with the intention that the thoughts of some of the Founding Fathers may be useful in placing "Our Federalism" in its proper perspective.

The eminent Virginian, George Mason, warned of the Constitution that ". . . [t]hese two concurrent powers cannot exist long together, the one will destroy the other." James Winthrop: "We shall find it impossible to please two masters." Logic seemed to require either a national government or the separate state governments to exercise absolute sovereignty in their spheres. "I have never heard," said William Grayson, "of two supreme co-ordinate powers in one and the same country before. I cannot conceive how it can happen. It surpasses everything that I have read of concerning other governments, or that I can conceive by the utmost exertions of my faculties."

The most democratic of the revolutionaries of 1776 balked at a constitution which they regarded as intending to eradicate state power. Samuel Adams said of the Convention: "I confess, as I enter the Building, I stumble at the threshold. I meet with a National Government, instead of a Federal Union of Sovereign States." Perhaps William Lenoir of North Carolina placed the Antifederalist arguments in their clearest modern perspective. "Instead of securing the sovereignty of the states," the constitution ". . . is calculated to melt them down into one solid empire." Lenoir's empire would be oppressive because ". . . no extensive empire can be governed upon republican

principles, and that such a government will degenerate to a despotism, unless it be made up of a confederacy of small states, each having the full powers of internal regulation." To Lenoir, and the Antifederalists, different states meant different interests, different climates, different habits, different needs, requiring different laws and different regulations. Wood, *supra,* 525-527.

The result of the Antifederalist reaction to the adoption of a new constitution was to force a balance which Madison said was a constitution ". . . not completely consolidated, nor is it entirely federal." It was, said Madison, "of a mixed nature" made up "of many coequal sovereignties." In retrospect, perhaps, "coequal sovereignties" may be confused with the "sovereignty over sovereigns" that Madison had condemned in *The Federalist,* No. 20, but the conclusion is unnecessary because what the Federalists had created was a living, vibrant document: a written Constitution in which power and the perogatives of the sovereign itself were distributed and balanced not only for the eighteenth century but for as long as this balance served the needs and liberties of the people.

The allocation of power which the Constitution effected was the key to its survival. If the structure, if its allocation of power was sound, the document would endure. If the divisions of federal power were unsound or if state perogatives were recklessly abused, the Constitution was unlikely to prove a viable instrument of government. The test would be in the flexibility of the document itself.

> "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct

> sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE." Hamilton, *The Federalist,* Number 82.

Thirty years after Hamilton wrote the Federalist papers a Supreme Court Justice appointed to the court by James Madison wrote on the subject of the powers granted by the Constitution:

> "The constitution, unavoidably, deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself." *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326 (1816) (Story, J.)

Power was the essential subject of the Constitution. Who should possess it and how it should be used were questions that the Founding Fathers sought to answer. Containing the flexibility noted by both Hamilton and Justice Story, the Constitution endured precisely because

it embodied "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

This Court has long recognized that one of the primary concerns of "Our Federalism" is the ". . . independence and integrity of the state courts, their important role in our federal system, and except in the most extraordinary circumstances, their right to conduct proceedings free from federal court interference." See Carey, *Federal Court Intervention in State Criminal Prosecution,* 56 Mass. L.Q. 11 (1971). The interest of the states in the administration of their criminal law is obvious. Probably in no other context is the state interest likely to be as high as in an instance where the basis of the violation of the principles of federalism is the presumption that state official action to enforce its criminal laws is working a denial of a constitutional right. The premise of virtually all federal court interference with state action is conduct by an official or officials of a state which is alleged, in a federal forum, to constitute a violation of a federal right. When the right purportedly being violated is being violated in a state judicial proceeding, federal intervention calls into question the very integrity of the state process. By intervening, in any way, the federal court has acted upon the assumption that state judges will not enforce the United States Constitution, though their duty to do so differs in no way from their federal counterparts. Cf. *Robb* v. *Connolly,* 111 U.S. 624 (1884).

Since the decision in *Ex parte Young,* 209 U.S. 123 (1908), this Court has developed various theories designed

to mitigate the generally abrasive effect any federal intervention will have on state procedure.[2] In the instant case the respondents filed class actions in the federal court seeking declaratory and injunctive relief against their arrest and detention pursuant to the Florida information procedure. The respondents had been arrested and were incarcerated under Florida law. They then sought adjudication of a federal constitutional question concerning their right to a pretrial hearing on the issue of probable cause to arrest.

Beginning with *Douglas* v. *City of Jeanette,* 319 U.S. 157 (1943), this Court has addressed the question of when declaratory and injunctive relief may be appropriate to intervene in a state matter. After disposing of the jurisdictional question[3] Chief Justice Stone said, at 162-163:

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[2] See generally, Hart and Wechsler, *The Federal Courts and the Federal System* (2d Ed. 1973), 926-1056; Wright, *Handbook of the Law of the Federal Courts,* (2d Ed. 1970). See also, Kurland, *Toward A Cooperative Judicial Federalism: The Federal Court Abstention Doctrine,* 24 F.R.D. 481 (1960); Wright, *The Abstention Doctrine Reconsidered,* 37 Tex. L. Rev. 815 (1959).

As will be presented in the text of the *Amicus* brief the specific doctrine of "Abstention" applicable to this case is quite narrow and the doctrine of *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941), cited by the petitioner, is not on point, nor is the reference to 28 U.S.C. § 2283. See fn. 4, *infra.* Brief for Petitioner, p. 19.

[3] The question in cases where equitable relief is sought against a state court proceeding is not a jurisdictional one. If there is jurisdiction under 28 U.S.C. § 1343 whether relief is available under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 depends on what the dictates of comity and federalism are in a particular case. Chief Justice Stone, in *Douglas,* at 162:

> "Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, *Di Giovanni*

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judiciary Article of the Constitution. Congress by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent."

The Chief Justice said it was a familiar rule that courts of equity ordinarily do not restrain criminal prosecutions. The imminence of the prosecution was not a ground for equitable relief since the state court as well as the federal court could determine the lawfulness or constitutionality of the statute in question:

"Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted." *Id.*, at 163.

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v. *Camden Ins. Assn.*, 296 U.S. 64, 69; *Pennsylvania* v. *Williams*, 294 U.S. 176, 181-82, may nevertheless, in the discretion of the court, be objected to on its own motion. *Twist* v. *Prairie Oil Co.*, 274 U.S. 684, 690; *Pennsylvania* v. *Williams*, *supra*, 185. Especially should it do so where its powers are invoked to interfere by injunction with threatened criminal prosecutions in a state court."

The doctrine enunciated in *Douglas* has been termed "Equitable Restraint." Hart and Wechsler, *The Federal Courts and The Federal System* (2d Ed. 1973), 1009-1050. Since purely equitable considerations are not controlling, *Douglas* dealt with the broader question of federalism and the principle that ". . . notions of federal-state comity intersect traditional equity requirements in connection with the more inclusive requirement that the plaintiff in equity show irreparable harm, and more particularly in connection with equity's traditional reluctance to interfere with criminal proceedings unless such harm would result." Hart and Wechsler, *supra*, at 1010.

The *Douglas* doctrine of equitable restraint stood unquestioned until 1965 when *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), distinguished certain First Amendment questions which may be subject to a "chilling effect" when there is a threatened state prosecution. *Dombrowski* appeared to many to have modified the *Douglas* line of cases and in 1971 this Court decided a series of cases designed, it is suggested, to reaffirm the principles of the doctrine of equitable restraint. *Younger* v. *Harris*, *supra*, 401 U.S. 37; *Samuels* v. *Mackell*, 401 U.S. 66, *Perez* v. *Ledesma*, 401 U.S. 82, were all decided February 23, 1971, and are, in the view of at least one respected commentator, among the most significant cases affecting the law of the federal court decided in years. Wright, *Handbook of the Law of the Federal Courts* (2d Ed. 1970), Foreword to 1972 Pocket Part.

Younger dealt with the question whether, after *Dombrowski*, a federal court could issue an injunction to restrain a pending state criminal proceeding. The District Court, sitting with three judges pursuant to 28 U.S.C. § 2284, enjoined Younger, the District Attorney for Los Angeles

County, from enforcing the California Criminal Syndicalism Act and from further prosecution of the currently pending action against Harris. Younger appealed directly to this Court pursuant to 28 U.S.C. § 1253 and Justice Black writing for the Court[4] reversed the three-judge District Court. The Court held ". . . the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions." *Younger, supra,* at 53. Moreover, ". . . the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it. . . ." The failure of Harris ". . . to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief," bars federal intervention. *Id.,* at 54.

Samuels v. *Mackell, supra,* rested on the same foundation as *Younger,* holding that when declaratory relief is sought, the requirement of irreparable harm applicable to traditional equity actions must govern the propriety of federal intervention. There are at least two principles present in *Younger* and *Samuels,* which are specifically relevant to the instant cases.

1. There must be a *pending* state criminal prosecution for the doctrine to apply.

[4] In *Younger,* Justice Black wrote for a majority. Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall concurred in the result, because Harris had not alleged bad faith harassment.

Mr. Justice Stewart, with whom Justice Harlan joined, concurred with the notation that the Court was specifically avoiding the question whether 28 U.S.C. § 2283 applied to a declaratory judgment or whether 42 U.S.C. § 1983 was an expressly authorized exception to the anti-injunction statute. Mr. Justice Douglas dissented.

In *Mitchum* v. *Foster,* 402 U.S. 941 (1971), the Court held 42 U.S.C. § 1983 was an expressly authorized exception to 28 U.S.C. § 2283.

2. If there is a pending state prosecution, the federal plaintiff must have an opportunity to present his federal claim during the course of the proceeding.

The Attorney General of Massachusetts, as *amicus curiae,* would suggest the *Younger-Samuels* rule must be absolute if the state's interest is to be respected. That is, where a state defendant may raise his federal claim in the state proceeding no federal intervention is justifiable to interfere with a pending state criminal action.

In the case at the bar the respondents were arrested and incarcerated. The State of Florida took custody of them under its criminal laws. From this it would appear undisputed that Florida had a pending prosecution against persons concerning whom the state attorney had filed informations certifying probable cause to arrest. The request for relief, however, was not directed at the statute under which the state defendants were being held. In this instance the federal claim was that a state procedure occurring between arrest and trial was inadequate. The Court of Appeals for the Fifth Circuit found this distinguishing feature sufficient to remove the case from the *Younger-Samuels* rule:

> "This court has declined to issue declaratory or injunctive relief interfering with pending or future state court prosecutions, unless the state statute under which the plaintiffs were being prosecuted was allegedly unconstitutional on its face. However, we have not declined to adjudicate federal questions properly presented merely because resolution of these questions would affect state procedures for handling criminal cases. Where, as here, the relief sought is not 'against any pending or future court proceedings *as such.*' *Younger* is inapplicable.

"The relief sought by these plaintiffs was not against any state prosecution *as such* but only against the state's practice of considering the state attorney a sufficient judge of probable cause to hold arrestees until arraignment or trial. Simply declaring that the plaintiffs were entitled to pre-trial procedural rights, the District Court said that the plaintiffs should 'immediately be given a preliminary hearing to determine probable cause by a committing magistrate *unless their cases have been otherwise concluded.*" By recognizing that some plaintiffs' cases might have been concluded, the Court demonstrated that its declaration of pre-trial rights was not to impede the plaintiffs' prosecutions." *Pugh* v. *Rainwater*, 483 F. 2d 778, 781-782 (5th Cir. 1973) (emphasis in original, citations omitted).

The amicus curiae would respectfully suggest to the Court that the distinction between prosecutions and prosecutions "as such" is simply not tenable. The question is whether or not a state prosecution has commenced. In the instant case it clearly had. The Fifth Circuit's reliance on *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), is not well placed if only because *Fuentes* had nothing to do with a pending state criminal prosecution. The doctrine of equitable restraint that the *amicus curiae* submits as applicable to the present cases applies only to state criminal prosecutions and reaches no further. It is true as the Fifth Circuit implies that since the relief sought would not enjoin further prosecution of the statute under which the respondent was arrested the precise *Younger* situation does not exist. However, the Court ignored the fact that another situation covered by the *Younger* principle might exist.

In *Samuels* the request was for declaratory relief and even though there would be no interference with the state

proceeding until the declaratory judgment was issued the intrusive effect of the federal proceeding was seen as sufficient to require federal restraint. Indeed, in *Perez* v. *Ledesma, supra,* this Court reversed the District Court's grant of unjunctive relief which did not enjoin a prosecution, but which did order illegally seized materials returned to the state defendants and barred the use of the material at the state trial. Justice Black said this action was improper under the *Younger* doctrine because it ". . . would effectively stifle the then-pending state criminal prosecution." *Id.* at 84.

Justice Black then restated the basic *Younger* rule, at 85.

"Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

In view of the above, the amicus curiae would suggest that it cannot be seriously contended that the injunctive relief granted below did not have exactly the same "intrusive" effect on the Florida prosecution condemned in *Perez.* Neither *Younger*, nor *Samuels*, nor *Perez*, nor *Steffel* v. *Thompson*, 415 U.S. , 94 S. Ct. 1209 (1974), made any distinction between state prosecutions and state prosecutions "as such." The question is, as characterized by Justice Black in *Younger*, at 44, ". . . a proper respect for state functions," and this respect must be paid to the state courts if the federal system is to have continuing vitality.

The *amicus curiae* would not, however, contend that federal intervention cannot occur where the state proceeding does not allow an individual to raise a federal constitution-

al claim. In the instant case there is from the opinions below a question whether Florida does provide any procedural vehicle for the presentation of the federal claim. Assuming, *arguendo,* that the Florida information procedure might be inadequate, a point that will be discussed below, it does not appear to the *amicus curiae* that Florida does not provide a means for one to raise the question of probable cause to arrest.

The Fifth Circuit in its *Pugh* v. *Rainwater* opinion said:

> "Arraignment is the first opportunity for a magistrate to inspect the state attorney's information setting forth the cause upon which the defendant was arrested." 483 F. 2d at 781.

The question occurs as to why the issue cannot be raised at this time. An examination of the brief for the respondents indicates that they do not affirmatively argue that the question may not be raised. Moreover, the Court of Appeals went even further on whether there was a means of raising the federal question. In a footnote to the sentence quoted above:

> "For purposes of this appeal, we *assume* that because Florida Statutes § 906.06 requires the state attorney to state the offense on the information form and § 906.07 says that 'the court, on motion, may order the prosecuting attorney to furnish a bill of particulars,' *the defendant could challenge the information for failure to show sufficient probable cause upon which to continue the prosecution.* Otherwise, the trial itself would present the first such opportunity for a probable cause challenge before a judicial officer. While bail hearings apparently are afforded even where the state prosecutes by information, there is no showing on this record that these hearings have ever been utilized to require the State Attorney to show probable cause for arresting as well as the reasons for setting bail at a particular level or for denying bail altogether." (Emphasis supplied.)

It must be suggested that if a proper reading of the doctrine of equitable restraint is as suggested by the *amicus curiae* the state defendant must first "set up and rely upon his defense in the state courts . . . unless it plainly appears that this course would not afford adequate protection." *Younger* v. *Harris, supra,* at 45, citing *Fenner* v. *Boykin,* 271 U.S. 240 (1926).

It is the function of the state of Florida to decide the legal question of probable cause. See *Beal* v. *Missouri Pacific Railroad,* 312 U.S. 45 (1941). Indeed, the doctrine of equitable restraint has been held to apply *a fortiori* where the request is to intervene piecemeal to try collateral issues in a criminal proceeding. Cf. *Stefanelli* v. *Minard,* 342 U.S. 117 (1951); Hart and Wechsler, *supra,* 1012. If Florida provides a means of raising the federal claim, as the Court of Appeals assumes, then federal intervention is barred.[5] The remedy a state provides in any particular

[5] It should also be noted that when the instant case was originally argued, counsel for the respondent admitted that a vehicle to test the question of probable cause existed:

> "The Chief Justice: The state mentioned a motion to dismiss as a method of testing probable cause once the information is filed. What do you think of that?
>
> "Well, I don't think so because the state's attorney can get around it." 42 L.W. 3550

It would appear to the *amicus curiae* that the question whether or not the state's attorney can "get around" the motion to dismiss is irrelevant to the question of equitable restraint.

instance may not be one specifically desired by an individual state defendant, but, if an adequate remedy is provided it precludes the federal court from intervention.

There is no question that in the wake of the Civil War it was a pervasive sense of nationalism which led to the adoption of the Civil Rights Act of 1871 and the Judiciary Act of 1875. See opinion of Mr. Justice Brennan in *Steffel* v. *Thompson, supra.* The *amicus curiae* would agree explicitly that the overriding import of this nationalist expansion was to the benefit of the country and the security of the liberties of the people. There comes a point, however, when one must question whether the system of federalism, of "coequal sovereignties," to quote Madison, is not being slighted. There is no basis to assume that any right secured by the Constitution of the United States will be sacrificed by allowing a state court to first hear questions bearing on that right. A proper respect for state functions dictates that the federal courts recognize that state judges owe the same duty and bear the same devotion to our Constitution as their federal brothers. That, in essence, is the rationale of the doctrine of equitable restraint.

II. There is No Constitutional Right to a Preliminary Hearing.

A. *The Information Procedure of the State of Florida Satisfies Due Process Standards as a Method of Initiating Criminal Proceedings.*

It is well settled that due process of law does not require that a state initiate criminal process by an indictment returned by a grand jury. *Hurtado* v. *California,* 110 U.S. 516 (1884); *Lem Woon* v. *Oregon,* 229 U.S. 586, 589 (1913).

Since 1790, lesser federal crimes have been prosecuted by information. Act of April 30, 1970, c. 9, § 3; 1 Stat. 119. Rule 7, Fed. R. Cr. P., provides for prosecution by information for offenses which are punishable by imprisonment for less than one year. Both Florida procedure and the federal rules provide that if an information is filed, a defendant's statutory right to a preliminary hearing will be vitiated. Rule 5, Fed. R. Cr. P. Historically, leave of court was required before an information could be filed. *United States* v. *Douglas,* 155 F. 2d 894 (7th Cir. 1946). However, in *Albrecht* v. *United States,* 273 U.S. 1 (1927), the Court indicated that the requirement that leave of court be obtained could be satisfied without verification or affidavits.

> "The United States Attorney, like the Attorney General or Solicitor General of England, may file an information under his oath of office; and, if he does so, his official oath may be accepted as sufficient to give verity to the allegations of the information." 273 U.S. at 6.

Subsequently, with the enactment of the Federal Rules of Criminal Procedure, Rule 7(a) made it unnecessary for leave of court to be obtained prior to the filing of an information. See *United States* v. *Hearne,* 6 F.R.D. 294 (D.C. Wis. 1946).

The procedure followed by Florida authorities is consistent with the Federal Rules. Fla. R. Cr. P., Rule 3:131, 3:140.

The lower federal courts have consistently held that the right to a preliminary hearing is procedural and that substantive and constitutional rights are not involved. *Scarbrough* v. *Dutton,* 393 F. 2d 6 (5th Cir. 1968); *Sciortino* v.

Zampano, 385 F. 2d 132 (2d Cir. 1967); *United States* v. *Luxenberg*, 374 F. 2d 241 (6th Cir. 1967); *Austin* v. *United States*, 408 F. 2d 808 (9th Cir. 1969).[6]

In *Rivera* v. *Government of the Virgin Islands*, 375 F. 2d 988 (3d Cir. 1967), the court stated: "Thus the filing of an information in the Virgin Islands is *the full equivalent of the presentment of an indictment by a grand jury* [citation omitted], just as it is in the United States district courts in those cases in which it is employed." 375 F. 2d at 990 (emphasis supplied).

Respondents and the Court of Appeals sought to distinguish the above-cited cases on the ground that the validity of the trial as affected by the lack of a preliminary hearing was the issue in those cases, while in the instant case, the respondents are attacking their pretrial detention as unconstitutional because they have not been granted a preliminary hearing.

The Commonwealth of Massachusetts, as *amicus curiae*, submits that the distinction is without merit. The basic question raised in the above-cited cases and the question presented in the instant case is: Whether a person held in state custody has a constitutional right to a preliminary hearing? Whether the Constitution mandates that such a hearing be provided is not, we submit, conditional on whether the question is raised prior to trial or after trial. Had the courts in these prior cases held that the defendants had been denied a constitutional right to a preliminary hearing, the result may well have been the same as in

[6] In the Commonwealth of Massachusetts, the Supreme Judicial Court has held that a defendant has no constitutional right to preliminary or probable cause hearing, and that "the prosecutor may seek an indictment without such a hearing even after the defendant has been arrested." *Commonwealth* v. *Britt*, Mass. Adv. Sh. (192) 1443, 1447, 285 N.E. 2d 780.

Coleman v. *Alabama*, 399 U.S. 1, 11 (1970), where the Court held that, on the issue of relief, inquiry must be made as to whether the denial of counsel at the preliminary hearing was harmless error. Therefore, we submit that the only distinction between the above-cited cases and the instant case concerns itself with the relief to be granted and not the constitutional issue raised.

When confronted with cases raising the question whether preliminary hearings should be afforded to defendants in order to test the evidence supporting an indictment by a grand jury, the Supreme Court has equated the indictment with the information and refused to find a constitutional basis for granting a preliminary hearing.

> ". . . this Court has several times ruled that an indictment returned by a legally constituted nonbiased grand jury, *like an information drawn by a prosecutor*, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment." (Emphasis supplied.) *Lawn* v. *United States*, 355 U.S. 339, 349 (1958).

This Court has consistently refused to require a series of mini-trials to test the sufficiency of the indictment or information.

> "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the

Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, *like an information drawn by the prosecutor,* if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States,* 350 U.S. 359, at 363 (1956) (emphasis supplied).

B. *The Issuance of a Warrant Pursuant to the Filing of an Information does Not Violate the Fourth Amendment.*

The Court below has held that the issuance of a warrant upon the filing of an information violates the Fourth and Fourteenth Amendments to the United States Constitution. The Court below has focused on the lack of judicial scrutiny of probable cause as the basis for its decision. However, when the information system is employed the requirements for probable cause differ much as they do under the grand jury system. The analysis by the Court in *Ocampo* v. *United States,* 234 U.S. 91 (1914), is on point.

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. . . . A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. . . . In short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal." 234 U.S. at 100.

The Court then held that the use of the information procedure which denied to an inhabitant of Manila a preliminary examination as to probable cause did not violate the prohibition of the Philippine Bill of Rights, § 5, "[t]hat no warrant shall issue, but upon probable cause, supported by oath or affirmation." 234 U.S. at 100.

The Court stated:

> "Here we find clear warrant for modifications of the practice and procedure; and since § 5 of the same act (quoted above) does not prescribe how 'probable cause' shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace. Consequently, a preliminary investigation conducted by the prosecuting attorney . . . and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement 'that no warrant shall issue but upon probable cause, supported by oath or affirmation.'" 234 U.S. at 100-101.

The respondents and the Court below appear to equate the initiation of criminal proceedings by information with the initiation of criminal proceedings by complaint. The Commonwealth of Massachusetts, as *amicus curiae,* submits that the two procedures are not equatable and that Fourth Amendment requirements differ. The Fourth Amendment contains no rigid definition of probable cause.[7]

[7] Under the prescribed statutory forms of indictments as contained in Mass. Gen. Laws, c. 277, § 79, there is no requirement that the facts constituting probable cause be recited. Nor for a warrant based upon indictment to issue is there any requirement that the facts constituting probable cause be recited. *Commonwealth* v. *Baldassini,* 357 Mass. 670, 676-677 (1970).

A showing of probable cause appropriate to protect a defendant arrested upon an information need not, we submit, be the same as that required at the complaint stage because in the former instance the information is in general verified by the prosecutor's oath of office. Such an oath has been deemed to be of sufficient integrity to support the information. *Albrecht* v. *United States, supra.*

This Court has equated informations with an indictment. *Costello* v. *United States, supra; Lawn* v. *United States, supra.* And, for the purposes of rendition, the courts of several states have in fact equated informations with indictments.

> "There is no doubt that a charge of crime in this form [information] where it is legal according to the laws of a state though not technically an indictment and not mentioned in the law of Congress, comes within the meaning of the law and would, and should be so regarded for the purpose of extradition if properly made." *People ex rel. Lyman* v. *Smith,* 352 Ill. 496 (1933). See also *Morrison* v. *Dwyer,* 143 Iowa, 502 (1909); *People* v. *Stockwell,* 135 Mich. 341 (1904); *In re Van Sciever,* 42 Neb. 778 (1894); *In re Hooper,* 52 Wis. 699 (1881).

While the rendition issues involved in these cases are not on point, the analysis by the various courts does indicate that informations are analogous to an indictment, rather than to a complaint. Therefore, we submit that, like an indictment, no judicial scrutiny of probable cause is required before a warrant may issue on the information. Rather, as with an indictment, if the information is fair on its face, the warrant should issue upon the request of the government as a matter of course. *Ex parte United States,* 287 U.S. 241 (1932).

Moreover, the Federal Rules do not require more.

> "Upon request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment." Rule 9(a), Fed. R. Cr.

As *amicus curiae,* the Commonwealth of Massachusetts submits that the existence of probable cause may be presumed from the fact that prosecution is instituted by a state attorney "under oath stating his good faith." Fla. Cr. P. Rule 3:140(g); *Albrecht* v. *United States, supra.* An order for arrest based upon the filing of an information conforms to the requirements of the Fourth Amendment. *United States* v. *Funk,* 412 F. 2d 452 (8th Cir. 1969). Also, we submit, it is a fair assumption that an information would not be filed in the absence of a determination that evidence sufficient to put before a grand jury exists and that, in addition, there exists sufficient admissible evidence to prove the case beyond reasonable doubt at trial.[8]

Therefore, as *amicus curiae,* the Commonwealth of Massachusetts suggests that there is no constitutional mandate under the Fourth or Fourteenth Amendments to the United States Constitution which requires that a preliminary hearing be afforded to defendants who are prosecuted either by indictment or information. In reaching this conclusion, we respectfully direct the court's attention to the words of Mr. Chief Justice Burger in his dissenting opinion in *Coleman* v. *Alabama,* 399 U.S. 1, 23-24 (1969):

> "Constitutional interpretation is not an easy matter, but we should be especially cautious about sub-

[8] See *In re Rule 3: 131(b), Florida Rules of Criminal Procedure,* Per Curiam Opinion of the Supreme Court of Florida, filed February 15, 1974, 289 So. 2d 3.

stituting our own notions for those of the Framers. I heed Mr. Justice Black's recent admonition on 'the difference . . . between our Constitution as *written* by the Founders and an unwritten constitution to be formulated by judges according to their ideas of fairness on a case-by-case basis. *North Carolina* v. *Pearce*, 395 U.S. 711, 744 (1969) (separate opinion of Black, J.) (emphasis in original)."

Conclusion.

For the reasons stated above, the Commonwealth of Massachusetts, as *amicus curiae*, respectfully suggests that the decision of the lower court be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, Petitioner

vs.

ROBERT PUGH, et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE INTEREST OF THE AMICUS CURIAE, KIMBERLY B. CHENEY

Kimberly B. Cheney is Attorney General of the State of Vermont and is charged with supervision of all criminal prosecutions in the State. 3 V.S.A. §153(a). He is also the Chairman of the Vermont Supreme Court Criminal Rules Advisory Committee that prepared the Vermont Rules of Criminal Procedure which became effective on October 1, 1973. The decision in this case could have a substantial impact on those Rules and practice in the State of Vermont in the area of pre-trial criminal procedure.

ARGUMENT

Because the issue before this Court on Certiorari concerns the procedure of prosecution upon information and the constitutional necessity of preliminary hearings before a magistrate, the Attorney General of Vermont submits this brief statement of his views *amicus curiae* on that question.

The Florida procedural framework considered below differs considerably from that present in Vermont. The purpose of this memorandum is thus twofold. The first is to apprise the Court of Vermont practice in the hope that this Court's decision will not place the constitutional validity of this procedure in doubt. The second is to suggest that the unique procedure of Vermont should be considered as a viable and sensible national model. However, as this brief can only highlight the key features of Vermont practice, pertinent sections of the Vermont Rules of Criminal Procedure (V.R.Cr.P.) and Reporter's Notes are reprinted in the Appendix for the Court's perusal in detail.

Vermont criminal procedure has recently undergone substantial revision. This stems from the promulgation by the Vermont Supreme Court of the new Vermont Rules of Criminal Procedure in January 1973. Following ratification by the General Assembly these Rules became effective on October 1, 1973.[1] The purpose of the new Rules was best described by the then Vermont Chief Justice in January of this year when he said:

> The Rules of Criminal Procedure are an attempt to create a new and streamlined code of criminal procedure for Vermont, combining our own experience and the most advanced thinking in the realm of procedural reform. The purposes of the rules are those set forth in Rule 2: "To provide for the just determination of every criminal proceeding . . . To secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." Accordingly, the rules not only carry forward features of our present customary and statutory practice which serve these purposes, but also draw heavily upon the American Bar Association's Minimum Standards for Criminal Justice, the Federal Rules of Criminal Procedure and proposed amendments thereto, and procedural codes of other states, all of which have the same goals.
> *Forward* by Chief Justice Percival L. Shangraw, pp. XXIX, V.R.Cr.P.

[1] Discussion of the Vermont Rules in this brief is largely drawn from the Reporter's Notes annotating each Rule. These Notes were prepared by Professor L. Kinvin Wroth of the University of Maine Law School who was appointed Reporter in July 1971. Citations to specific Rules in this brief import consideration of the body of the Rule and, where appropriate, Professor Wroth's commentary.

Pre-trial procedure and arrest upon information in Vermont is governed principally by Rules 3, 4, 5, 12, 15 and 16, V.R.Cr.P. Particularly relevant for purposes of this discussion are Rules 3(a)(b), 4(a)(b), 5(a)(c), 12(e), 15(a) and 16, V.R.Cr.P. (See Appendix).

I. Arrest Validation

Vermont Rules do not provide an automatic adversary preliminary hearing where the prosecution is forced to present a *prima facie* case. However, there is an independent finding of probable cause to arrest. Thus, Vermont does not suffer from the shortcoming of Florida practice perceived by the Court of Appeals. Rules 4(b) and 5(c), V.R.Cr.P. and Reporter's Notes. In Vermont, a law enforcement officer may arrest without warrant any person whom the officer has probable cause to believe has committed a crime in his presence. He may also arrest without warrant a person who he has probable cause to believe has committed or is committing a felony. The degree of probable cause required is based on the same evidence necessary for a summons or arrest warrant in a prosecution by information. Rules 3(a), 4(b), V.R.Cr.P. The arresting officer may issue the detained individual a citation to appear before a judicial officer in lieu of further detention. Otherwise, the arrestee must be taken before the nearest available judicial officer "without unneces-

sary delay." An information and affidavit must be filed with or made before the judicial officer at that time. Rule 3(b), V.R.Cr.P. Once the warrantless arrestee is before the judicial officer, the judicial officer determines whether there is probable cause to believe an offense has been committed and that the defendant has committed it. If no probable cause is found, the information is dismissed and the defendant discharged. Rule 5(c), V.R.Cr.P.

In a prosecution commenced by information, a State's Attorney cannot issue an arrest warrant himself but must request a judicial officer to issue either a summons or arrest warrant. He does so by presenting an information and affidavit or sworn statement made before the judicial officer as to probable cause. Rule 4(a), V.R.Cr.P. No summons or warrant can issue upon information unless the court finds that there is probable cause to believe that an offense has been committed, and the defendant has committed it. This finding must be based on substantial evidence and may include reliable hearsay. During this proceeding the prosecutor and any affiants may be required to appear personally and be examined under oath. The record of proceedings becomes a part of the affidavit. Rule 4(b), V.R.Cr.P.

Even after a finding of probable cause, however, the judicial officer is still encouraged to issue a summons, and may only issue an arrest warrant in limited situations. Rule 4(c), V.R.Cr.P.[2] As is the case with warrantless arrests under Rule

[2] If the offense charged is a misdemeanor, a summons must be issued unless the judicial officer finds that (a) the defendant has previously failed to respond to a citation, summons, warrant, or other order of the court, or (b) the defendant has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood he will refuse to respond to a summons, or (c) the whereabouts of the defendant are unknown and a warrant is necessary in order to subject him to the jurisdiction of the court, or (d) arrest is necessary to prevent bodily injury to the person or to the person of another or harm to property. If the offense charged is a felony, a summons for appearance must be issued in lieu of arrest warrant unless there is reasonable cause to believe that if not taken into custody the defendant will flee to avoid prosecution, will fail to respond to the summons, or will cause bodily injury to himself or to another or injury to property. Rule 4(c), V.R.Cr.P.

3, the arrestee on a judicial warrant issued following the filing of an information must be brought before the court "without unnecessary delay". Rule 4(f)(2)(c), V.R.Cr.P. At that hearing, no new determination of probable cause is made in the information case, nor is there an adversary preliminary examination of probable cause for the warrantless arrestee.

However, the arrestee on judicial warrant like the warrantless arrestee must be informed (a) of the charge against him and the minimum and maximum punishments, and provided with a copy of the information, (b) of his rights relative to counsel, retained or appointed, (c) of his rights relative to self incrimination and (d) how he may secure pretrial release, the schedule of further trial proceedings and of his rights relative to discovery and omnibus hearing. Rule 5(d), V.R.Cr.P. Also at that time, the court must determine the conditions of his pre-trial release. Rule 5(g).[3]

II. Optional Expedited Adversary Hearing

Rule 12(e)(1), V.R.Cr.P. provides that at any time after arraignment the defendant may move for dismissal of the information on the ground that the prosecution is unable to make a prima facie case against him. This motion must be heard at the omnibus hearing or upon completion of discovery, whichever is later. Rule 12(e), V.R.Cr.P. Normal-

[3] Vermont practice on pre-trial release parallels the American Bar Association's Minimum Standards, encourages release on personal recognizance and provides alternatives other than cash bail. Rule 5(g), V.R.Cr.P. and Reporter's Notes.

ly, if no expedited hearing is requested by defense counsel, this omnibus hearing is held 30 days after arraignment and arraignment is at least 24 hours after the Rule 5 hearing. Rules 12(f) and 5(f), V.R.Cr.P. If at that omnibus hearing, the prosecution fails to establish by affidavits, depositions, sworn oral testimony or other admissable evidence that it has substantial, admissable evidence of the offense challenged sufficient to withstand a motion for judgment of acquittal at trial, the court must dismiss the information and discharge the defendant. Rule 12(e), V.R.Cr.P.

However, Vermont's unique and speedy discovery procedure[4] also interacts with Rules 12(e) and 5 to promote judicial efficiency, narrow the issues and provide for rapid disposition and release where appropriate. Rule 12(e) has often been called a criminal motion for summary judgment which parallels the similar device available in civil practice. See Rule 56, Vermont Rules of Civil Procedure; Rule 56, Federal Rules of Civil Procedure; Rule 12(e)(2), V.R.Cr.P. and Reporter's Notes. This is because a Rule 12(e)(1) motion may be made at any time after arraignment.

As emphasized in the Reporter's Notes, a hearing on that motion may be expedited in a clear case where there is a dispositive issue that could end the matter. For example, an issue of mistaken identity could be promptly resolved at the Rule 5 hearing by a defense request for immediate arraignment and omnibus hearing. Rules 5(f), 12(e), (f) and Reporter's Notes. This is feasible because under the broad criminal discovery permitted in Vermont, the defendant may take the deposition of any witness immediately after the

[4] Vermont has pioneered in the concept of broad criminal discovery. See for example P. F. Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (June 1967). This procedure complements the expedited hearing potential provided in Rules 5(f) and 12(e), V.R.Cr.P.

filing of the State's Attorney's information. Rules 15(a) and 16, V.R.Cr.P. In short, Vermont procedure is flexible enough to permit immediate defense discovery and summary disposition where appropriate. Moreover, this procedure results in economies of judicial, police and prosecutorial time because adversary hearings are only conducted after defense counsel, through discovery, has determined that there is a genuine issue to be litigated.

In contrast to the practice in some jurisdictions, the failure of Rule 12 to provide an automatic adversary preliminary hearing is unique. However, this practice is based on the assumption that the Vermont method is constitutionally sufficient in view of the fact that the process of arrest validation, bail and binding the defendant over for trial are adequately covered by Rules 3, 4, and 5, V.R.Cr. P. This assumption is buttressed by the fact that the omnibus hearing required by Rule 12(f) and the extensive discovery permitted by Rules 15 and 16 further guard against unnecessary detention. This is especially true in view of the means to expedite this procedure discussed above. Rule 12, V.R.Cr.P. and Reporter's Notes.

With this background, we should compare Vermont practice with that encountered in the instant case. The primary evil perceived by the Court of Appeals below, the practice of considering the State's Attorney a sufficient judge of probable cause to arrest, does not exist in Vermont.[5] There is judicial scrutiny, albeit *ex parte*, prior to arraignment.[6] Unlike the Florida situation, Vermont detentioners cannot be held over 30 days (i.e. until arraignment) without a judicial examination of the merits of their pre-trial release.[7]

[5] 483 F.2d 782, 787.

[6] Arraignment may be held as part of Rule 5 proceedings if the defendants request. Otherwise, it is set for a later time. Rule 5(f), V.R.Cr.P.

[7] 483 F.2d 780, 782; Rules 3, 4, and 5, V.R.Cr.P. and Reporter's Notes.

This matter is explored at the Rule 5 hearing which must be held "without unnecessary delay". Rules 4(f)(2)(C) and 5(a), (c), (g), V.R.Cr.P. and Reporter's Notes. See also *McNabb* v. *United States*, 318 U.S. 322 (1943); *Mallory* v. *United States* 354 U.S. 449 (1957); *Miranda* v. *Arizona*, 384 U.S. 436 (1966) at 463 n.32; *United States* v. *Keeble*, 459 F.2d 757 (8th Cir. 1972).

In short, the Vermont system is far superior to the procedural framework sustained in *Shadwick* v. *Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1971). In *Shadwick*, the petitioner challenged the issuance of warrants by clerks of the Municipal Court on the theory that they were not neutral and detached magistrates within the ambit of the Fourth Amendment of the United States Constitution. This Court disagreed, holding that the clerks were judicial officers. It was explained that:

> The warrant traditionally has represented an independent assurance that [an] . . . arrest will not proceed without probable cause to believe that a crime has been committed and that the person . . . named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest . . . This court long has insisted that inferences of probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise, of ferreting out crime. [Citations omitted] *Id.* at 350, 92 S.Ct. at 2122.

There is no question that Vermont practice surpasses the standards of *Shadwick*, supra. Vermont procedure requires a judge, rather than a court clerk to find probable cause for an arrest, and the defense may avail itself of the Rule 12 procedure.

It should also be noted that the distinction made in Florida

(Amended Rule 3.131, 33 F.S.A.) between felons and misdemeanants for purposes of the availability of probable cause hearings does not exist in Vermont. Probable cause is determined by a judicial officer, either before or "without unnecessary delay" after every arrest, regardless of the classification of the offense. This is true whether arrest is without warrant or upon a judicial warrant following the filing of an information. In fact, Vermont Rules strongly encourage the issuance of a citation to appear in misdemeanor cases in lieu of either a warrantless arrest or issuance of a warrant. Rules 3 and 4, V.R.Cr.P.

Finally, Vermont has no equivalent to the Florida practice of delayed probable cause hearings in capital or life imprisonment cases. Amended Rule 3.131(b), 33 F.S.A. Once again, it is the fact of a warrantless arrest or the potential for arrest in an information situation which triggers the probable cause hearing. The penalty or nature of the offense alleged plays no part in the matter. Rules 3, 4, and 5, V.R.Cr.P.

CONCLUSION

This brief was designed to acquaint the court with the unique yet sound Vermont Rules of Criminal Procedure dealing with prosecution upon information and arrest. The paramount deficiency in Florida practice which impressed the courts below, the absence of an impartial judicial determination of probable cause in information prosecutions, does not exist in Vermont. Likewise, Vermont makes no distinction relative to the availability of a probable cause hearing because the offense is denominated a felony or misdemeanor; nor do the Vermont Rules establish a separate time frame for capital offenses or those requiring life imprisonment.

In short, Vermont information practice comports with the Constitution and has none of the evils perceived by the courts below. Therefore, it is hoped that any relief framed

in this case will be sufficiently limited to avoid placing the constitutionality of the present Vermont procedure in doubt.

Respectfully submitted,

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APPENDIX

Rules 3, 4, 5, 12, 15(a), 16
VERMONT RULES OF CRIMINAL
AND
APPELLATE PROCEDURE

RULE 3. ARREST WITHOUT WARRANT; CITATION TO APPEAR

(a) ARREST WITHOUT WARRANT. A law enforcement officer may arrest without warrant a person whom the officer has probable cause to believe has committed a crime in the presence of the officer. Such an arrest shall be made while the crime is being committed or without unreasonable delay thereafter. An officer may also arrest without warrant a person whom the officer has probable cause to believe has committed or is committing a felony. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4(b).

(b) SAME: PROCEDURE. A person arrested without warrant shall either be released in accordance with subdivision (c) of this rule or shall be brought before the nearest available judicial officer without unnecessary delay. The information and affidavit or sworn statement required by Rule 4(a) shall be filed with or made before the judicial officer when the arrested person is brought before him.

(c) CITATION TO APPEAR BEFORE A JUDICIAL OFFICER.

(1) *Mandatory Issuance.* A law enforcement officer acting without warrant who has grounds to arrest a person for a misdemeanor shall, except as provided in paragraph (2) of this subdivision, issue a citation to appear before a judicial officer in lieu of arrest. In such circumstances, the law enforcement officer may stop and briefly detain such person for the purpose of determining whether any of the excep-

tions in paragraph (2) applies, and issuing a citation, but if no arrest is made, such detention shall not be deemed an arrest for any purpose. When a person has been arrested without warrant, a citation to appear in lieu of continued custody shall be issued as provided in this rule if (A) the charge for which the arrest was made is reduced to a misdemeanor and none of the exceptions in paragraph (2) applies, or (B) the arrest was for a misdemeanor under one of the exceptions in paragraph (2) and the reasons for the exception no longer exist.

(2) *Exceptions.* The citation required in paragraph (1) of this subdivision need not be issued, and the person may be arrested or continued in custody, if

(A) A person subject to lawful arrest fails to identiy himself satisfactorily; or

(B) Arrest is necessary to obtain nontestimonial evidence upon the person or within the reach of the arrested person; or

(C) Arrest is necessary to prevent bodily injury to the person arrested or to the person of another, harm to property, or continuation of the criminal conduct for which the arrest is made; or

(D) The person has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood that he will refuse to respond to a citation; or

(E) The person has previously failed to appear in response to a citation, summons, warrant or other order of court issued in connection with the same or another offense.

(3) *Discretionary Issuance in Cases of Felony.* A law enforcement officer acting without warrant may issue a citation to appear in lieu of arrest or continued custody to a person charged with any felony where arrest or continued custody is not patently necessary for the public safety and such facts as the officer is reasonably able to ascertain as to the person's place and length of residence, family relationships, references, past and present employment, his criminal record, and other relevant matters satisfy the officer that the person will appear in response to a citation.

(4) *Discretionary Issuance by Prosecuting Officer.* A prosecuting officer may issue a citation to appear to any person whom the officer has probable cause to believe has committed a crime. The citation shall be served as provided for service of summons in Rule 4(f)(1) of these Rules. Probable cause shall be based upon the same evidence required for issuance of a summons or warrant under Rule 4(b).

(5) *Form.* The citation to appear shall be dated and signed by the issuing officer and shall state the name of the person to whom it is issued and the offense for which he would have been arrested or continued in custody. It shall direct the person to appear before a judicial officer at a stated time and place.

(6) *Filing Citation and Information with Judicial Officer.* A copy of the citation to appear, signed by the officer issuing it, and the information and affidavit or sworn statement required by Rule 4(a), shall be filed with or made before the judicial officer at the time for appearance stated in the citation.

RULE 4. SUMMONS OR ARREST WARRANT UPON INDICTMENT OR INFORMATION

(a) Application to Judicial Officer. A prosecuting officer may request a judicial officer to issue a summons or arrest warrant for any defendant, not already arrested or cited to appear for the same offense, who is named (1) in an indictment presented on oath of the foreman of a grand jury or (2) in an information presented on oath of the prosecuting officer accompanied by an affidavit or affidavits or a sworn statement made before the judicial officer as to probable cause. Any sworn statement so made shall be taken

down by a court reporter or recording equipment. The prosecuting officer shall present with his application such information as reasonable investigation would reveal concerning the defendant's (i) residence, (ii) employment, (iii) family relationships, (iv) past history of response to legal process, and (v) past criminal record. At the time when an information or indictment is presented to him, the judicial officer shall make a minute thereon in writing, under his official signature, of the date on which the same was presented.

(b) FINDING OF PROBABLE CAUSE UPON INFORMATION. No summons or warrant shall be issued upon information unless the judicial officer finds that there is probable cause to believe that an offense has been committed and that the defendant has committed it. The finding of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided that there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a summons or warrant, the judicial officer may require the prosecuting officer and affiant or affiants to appear personally and may examine under oath the affiant or affiants and any witnesses the prosecuting officer may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment, or the judicial officer shall promptly make a summary of it. Such record or summary shall be made part of the affidavit.

(c) ISSUANCE OF SUMMONS. Upon an indictment or upon an information and finding of probable cause,

(1) If the offense charged is a misdemeanor, the judicial officer shall issue a summons for the appearance of the defendant before a judicial officer, unless he finds that

(A) The defendant has previously failed to respond to a

citation, summons, warrant, or other order of court issued in connection with the same or another offense; or

(B) The defendant has no ties to the community reasonably sufficient to assure his appearance or there is a substantial likelihood that he will refuse to respond to a summons; or

(C) The whereabouts of the defendant are unknown and the issuance of an arrest warrant is necessary in order to subject him to the jurisdiction of the court; or

(D) Arrest is necessary to prevent bodily injury to the person arrested or to the person of another or harm to property.

(2) The judicial officer shall likewise issue a summons in any case in which the prosecuting officer so requests.

(3) If the offense charged is a felony, the judicial officer may issue a summons for the appearance of the defendant unless there is reasonable cause to believe that, if not taken into custody, the defendant will flee to avoid prosecution, will fail to respond to the summons, or will cause bodily injury to himself or to another or injury to property.

(4) The summons shall be issued to the prosecuting officer for delivery to the person who is to make service and the judicial officer shall file a copy of the summons and indictment or information and affidavit or sworn statement in the County Court or territorial unit of the District Court having jurisdiction of the offense.

If the defendant fails to appear in response to the summons, a warrant may be issued on the basis of the same indictment or information.

(d) ISSUANCE OF ARREST WARRANT. Upon an indictment or upon an information and finding of probable cause in any case in which the judicial officer does not issue a summons as provided in subdivision (c), he shall issue a warrant for the arrest of the defendant to any law enforcement officer authorized by these rules to execute it. The

judicial officer shall file a copy of the warrant and the indictment or information and affidavit or sworn statement in the County Court or territorial unit of the District Court having jurisdiction of the offense.

(e) FORM.

(1) *Summons.* The summons shall be dated and signed by the judicial officer. It shall be directed to the defendant and shall summon him to appear before a judicial officer at a stated time and place. It shall describe in general terms the offense charged in the indictment or information.

(2) *Arrest Warrant.* The arrest warrant shall be in the same form as the summons, except that it shall be directed to any law enforcement officer and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall command that the defendant be arrested and brought without unnecessary delay before the nearest available judicial officer.

(f) SERVICE OR EXECUTION; RETURN.

(1) *Service of Summons.*

(A) *By Whom.* The summons may be served by any person authorized by the Vermont Rules of Civil Procedure to serve process in a civil action or by any law enforcement officer.

(B) *Territorial Limits.* The summons may be served at any place within the state of Vermont.

(C) *Manner.* The summons shall be served upon a defendant by any means provided by the Vermont Rules of Civil Procedure for service of process within the state in a civil action. In addition, service may be by registered or certified mail, return receipt requested, with instructions to deliver to addressee only. Service by mail shall be complete when the mail is delivered and the return receipt signed or when acceptance is refused.

(D) *Return.* On or before the return day the person to whom a summons was delivered for service shall make return thereof, with the indictment or information and affidavit or sworn statement, to the judicial officer before whom the defendant was summoned to appear. If service was by mail, the return shall consist of the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons was sent to the defendant by ordinary first-class mail. At the request of the prosecuting officer made at any time while the indictment or information is pending, a summons returned unserved, or a duplicate thereof, may be delivered by the judicial officer to any officer or appropriate person for service.

(2) *Execution of Warrant.*

(A) *By Whom.* The warrant may be executed by any law enforcement officer.

(B) *Territorial Limits.* The warrant may be executed at any place within the state of Vermont.

(C) *Manner.* The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as practicable and at that time shall deliver to the defendant a copy of the warrant. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The officer executing the warrant shall bring the defendant without unnecessary delay before the nearest available judicial officer.

(D) *Return.* The officer executing a warrant shall make return thereof, with the indictment or information and affidavit or sworn statement, to the judicial officer before whom the defendant is brought. At the request of the prosecuting officer, any unexecuted warrant shall be returned to

any judicial officer and cancelled by him. At the request of the prosecuting officer made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled, or a duplicate thereof, may be delivered by the judicial officer to any officer or appropriate person for execution.

RULE 5. APPEARANCE BEFORE A JUDICIAL OFFICER

(a) IN GENERAL. When a person arrested with or without a warrant, or served a citation or summons, is brought or appears before a judicial officer as provided in Rules 3 and 4, the judicial officer shall proceed in accordance with this rule. All proceedings except those under subdivision (b) of this rule shall be taken down by a court reporter or recording equipment.

(b) TEMPORARY RELEASE PENDING APPEARANCE. The presiding judge of each County Court and the judge of each territorial unit of the District Court shall establish procedures and standards by which persons arrested with or without warrant other than during normal business hours may be released pending appearance under this rule. Such appearance shall be held as soon as possible after release.

(c) INITIAL DETERMINATION OF PROBABLE CAUSE. If the defendant was arrested without a warrant or appeared in response to a citation issued under Rule 3 and the prosecution is upon information, the judicial officer shall determine in the manner provided in Rule 4(b) for issuance of summons or warrant whether there is probable cause to believe that an offense has been committed and that the defendant has committed it. If the judicial officer does not find probable cause, he shall dismiss the information without prejudice and discharge the defendant. Upon conclusion of proceedings under this rule, the judicial officer shall file the indictment or information and affidavit or sworn statement in the

County Court or territorial unit of the District Court having jurisdiction of the offense.

(d) STATEMENT BY THE JUDICIAL OFFICER. The judicial officer shall inform the defendant before taking any further action under this rule

(1) Of the charge against him and the minimum and maximum punishments for it and provide him with a copy of the indictment or information and affidavit or sworn statement;

(2) Of his right to retain and consult counsel before making any statement or answering any questions at the present hearing or subsequently; in an appropriate case, of his right to request the assignment of counsel at state expense if he is financially unable to retain counsel; and of his right to communicate with counsel, family, or friends;

(3) That he is not required to make any statement or answer any questions at the present hearing or subsequently and that anything he says may be used against him;

(4) Of the general circumstances under which he may secure pre-trial release; and,

(5) If he is not represented by counsel, of the nature and approximate schedule of further pre-trial proceedings to be taken in the case and of his rights to discovery and an omnibus hearing.

(e) ASSIGNMENT OF AND CONSULTATION WITH COUNSEL. No further proceedings shall be had until counsel has been assigned, if the case is an appropriate one for such assignment, and until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(f) DETERMINATION OF ARRAIGNMENT DATE. If the defendant is not discharged under subdivision (c), the judicial officer shall, upon consultation with the prosecuting officer and the defendant or his counsel, set a date and time

for arraignment which shall be within a reasonable time, but in no event less than 24 hours, after the time of such determination, except at the request of the defendant. If the judicial officer is a Superior or District Judge sitting in the County Court or territorial unit of the District Court having jurisdiction of the offense, he may, if the defendant so requests, conduct the arraignment forthwith as part of the proceedings under this rule, or he may order the defendant to appear before him at a later date and time. Otherwise, the judicial officer shall order the defendant to appear for arraignment in the court having jurisdiction at the date and time set.

(g) PRE-TRIAL RELEASE. If the defendant has been arrested and is not released upon citation under Rule 3(c) or discharged under subdivision (c) of this rule and the prosecuting officer does not stipulate to the release of the defendant on his own recognizance, the judicial officer shall determine whether and on what conditions the defendant shall be released pending trial in accordance with the standards provided in Rule 46.

—Amended Dec. 19, 1973, eff. Jan. 1, 1974.

RULE 5. REPORTER'S NOTES

This rule departs significantly from Federal Rules 5 and 5.1. The rule is in part based upon ABA Minimum Standards (Pretrial Release) §§4.1-4.5. It contains, however, several features unique to these rules that to some extent reflect prior Vermont practice. Basically, the rule provides an initial appearance before a judicial officer for every defendant whether cited or summoned to appear or arrested with or without warrant. Note that a "judicial officer" for purposes of this rule is a Superior or District Judge or an acting District Judge. Rule 14(c)(4). The function of the appearance is to dispose of a variety of preliminary matters, including the determination of probable cause for those arrested without warrant or cited to appear under Rule 3, a statement to the defendant of the charge and his rights, assignment of counsel, arraignment or the determination of a date for arraignment, and the conditions of pretrial release under Rule 46. Questions pertaining to the merits of the charge are largely left to motion practice under Rule 12 and discovery under Rules 15-16.2.

The rule consolidates and makes mandatory a number of features of prior Vermont practice. Under the former municipal court practice, a defendant, upon arrest, was to be brought forthwith before a justice of the peace or municipal court. If the offense charged was beyond the jurisdiction of the municipal court, he was to be examined and bound over to the County Court. See 13 V.S.A. §§5507-5508 (repealed by Act No. 118 of 1973, §25), 5551-5553 (repealed by Act No. 258 of 1971, §19). The Court had held that, at least in felonies, probable cause was properly in issue in the binding-over proceedings, which were treated as a kind of preliminary examination. In re Davis, 126 Vt. 142, 224 A.2d 905 (1966). In the District Court and County Courts, 13 V.S.A. §5653 (repealed by Act No. 118 of 1973, §25) required that a person arrested upon information be brought "as soon as possible" before a judicial officer, which by statute included a court clerk. The judicial officer was thereupon to fix bail in accordance with 13 V.S.A. §7553a. The Public Defender Act, 13 V.S.A. §§5234, 5235, required the giving of notice of the right to counsel and notification of the Public Defender at the earliest judicial appearance. Although the practice under these provisions was not uniform, in many courts these functions where possible were combined with a probable cause hearing and arraignment in a single proceeding not unlike that contemplated under Rule 5. See In re Mahoney, 128 Vt. 462, 266 A.2d 444 (1970). The

Court recently held that a defendant arrested upon warrant has the right to a probable cause hearing on motion before trial. State v. Perry, 131 Vt. 75, 300 A.2d 615 (1973).

Rule 5(a) makes clear that proceedings under this rule occur regardless of the means by which the prosecution has been commenced. See Reporter's Notes to Rules 3 and 4. A verbatim record is required because of the importance of the matters considered, especially the probable cause determination under subdivision (c), the judicial officer's Miranda warning under subdivision (d), the assignment of counsel under subdivision (e), and arraignment or determination of the date thereof under subdivision (f). See ABA Minimum Standards (Pretrial Release) §4.3(c) cf; 13 V.S.A. §5234 (c)(1). Of course, if the prosecution fails to present an indictment or information at the defendant's appearance under this rule as required by Rules 3(b), 3(c)(6), 4(f)(1)(D), and 4(f)(2)(D), the defendant should be discharged without prejudice to the prosecution, unless the prosecution shows cause for a brief continuance to enable it to produce the appropriate document. See Rule 48(b)(2). Cf. 13 V.S.A. §5654 (repealed by Act No. 118 of 1973, §25). The defendant may waive appearance under Rule 43(c)(2).

Rule 5(b) provides for a procedure similar to that followed in many District and County courts under prior Vermont practice. Under Rules 3(b) and 4(f)(2)(C), a person arrested with or without warrant is to be brought "before the nearest available judicial officer without unnecessary delay." This phrase, taken from Federal Rule 5(a), has a long history of interpretation in the federal courts, which will serve as a guide to its construction under these rules. For a full discussion, see Reporter's Notes to Rule 3(b). The appearance under Rule 5 is the procedural step which ultimately satisfies the requirement embodied in the phrase. It may be difficult, however, to locate a judicial officer when an

arrest occurs late at night or on a weekend. Yet, the circumstances of a warrantless arrest may be such that the arresting officer is unwilling to issue a citation, or the arrest may be upon warrant, giving the officer no such alternative. The federal courts have held that it is not "unnecessary delay" to defer the appearance until the regular business hours of the magistrate, although some courts have reasoned that the police may not continue interrogation during the prolonged unavailability of a magistrate. Compare Williams v. United States, 273 F.2d 781 (9th Cir.), cert. denied 362 U.S. 951 (1959), with Mitchell v. United States, 316 F.2d 354 (D.C. Cir. 1963). See 1 Wright, Federal Practice and Procedure §74, at pp. 97-99 (1969).

To alleviate the problem of continued detention during the unavailability of a magistrate, which is the principal target of the "unnecessary delay" rule, Rule 5(b) requires the trial courts to provide for temporary release of persons arrested other than during normal business hours. The exact form of the procedures and standards to be established is left to local practice and convenience. Possible procedures might include delegation of the responsibility for temporary release to the clerk or an arrangement for telephonic communication with a given judicial officer, who would agree to be "on call" for a particular area at a particular time. The standards to be applied should be based on those found in Rules 3(c) and 4(c) for the issuance of citations and summons, as well as upon those contained in the Bail Act, 13 V.S.A. §7553a (incorporated in these rules by Rule 46). As under those provisions, release on conditions other than cash bail or bond should be used if possible. See Reporter's Notes to Rules 3(c), 4(c), and 46(a).

If the defendant is released on a temporary basis, the "without unnecessary delay" requirement of Rules 3(b) and 4(f)(2)(C) has been met, because its basic purpose — pre-

vention of continuing interrogation of an uncounselled, uncharged defendant—has been satisfied. Rule 5(b) nevertheless requires that the Rule 5 appearance be held "as soon as possible after release." In ordinary circumstances this should be deemed to be at the commencement of the next regular business hours of the nearest available judicial officer. If the defendant is not released under Rule 5(b), either because release is denied or because he cannot meet the conditions set, the "without unnecessary delay" requirement still controls. In line with the federal cases previously cited, such a defendant's appearance should be delayed only as long as absolutely necessary and extreme caution should be used in any interrogation or other investigation carried out during the period of delay.

Rule 5(c) provides the only consideration of the merits of the charge which will ordinarily be undertaken at the Rule 5 appearance. The proceeding under this subdivision is intended to be an ex parte determination of probable cause made by the judicial officer for persons cited to appear or arrested without warrant under Rule 3. This determination is to be made on exactly the same basis and in the same manner as the probable cause determination under Rule 4(b) prior to the issuance of a summons or arrest warrant. The purpose of the determination, like the purpose of that under Rule 4(b), is only the evaluation of the existence of probable cause at the time of the citation or arrest and the consequent validation or invalidation of the actions of the law enforcement officer involved. This provision, like the Rule 4(b) determination, is not applicable to prosecutions upon indictment, which embody their own probable cause determinations. See Reporter's Notes to Rule 4(b). Because of its limited purpose, Rule 5(c) provides no opportunity for the defendant to cross-examine witnesses or present evidence or argument in his own behalf. At the conclusion of the Rule

5(c) proceedings, the defendant is either discharged or remains before the court ready for the remainder of the Rule 5 procedure as does the person summoned or arrested on warrant after a preliminary probable cause determination.

Rule 5(c) thus serves only the purpose of assuring for all defendants pretrial validation of the grounds for commencing the prosecution. Such a proceeding is probably required by the 4th and 14th Amendments, although the authorities are by no means clear. In general, an illegal arrest without more does not invalidate subsequent proceedings against a defendant thereby in custody. Frisbie v. Collins, 342 U.S. 519 (1952); In re Greenough, 116 Vt. 271, 75 A.2d 569 (1950). Moreover, the United States Supreme Court has held that in a state proceeding there is no constitutional requirement that a preliminary examination precede the commencement of proceedings by information. Lem Woon v. Oregon, 229 U.S. 586 (1913). Recent lower federal court cases suggest, however, that in cases of arrest without warrant an after-the-fact determination of probable cause is a constitutional requirement. Pugh v. Rainwater, 332 F.Supp. 1107 (S.D. Fla. 1971); Brown v. Fauntleroy, 442 F.2d 838 (D.C. Cir. 1971); cf. Morrissey v. Brewer, 408 U.S. 471 (1972); cf. State v. Perry, supra.

Regardless of constitutional requirements, the limited probable cause determination provided by Rule 5(c) is justified as a matter of policy and administrative efficiency. An early check on the validity of a citation or arrest not only encourages careful police practices in an area where significant invasions of privacy are involved but screens out at an inexpensive preliminary stage cases which might later be dismissed in any event as a result of the suppression of critical evidence obtained pursuant to an illegal arrest. See Ker v. California, 374 U.S. 23 (1963). If the state in fact has probable cause at the time of the dismissal that was not apparent

at the time of the arrest, it may commence proceedings over again by a proper citation or arrest.

The ex parte proceeding under Rule 5(c), with its arrest-validation purpose, is not to be confused with the adversary preliminary examination or hearing provided for in many state procedural systems and by Federal Rules 5 and 5.1, which may serve two further purposes: (1) As a binding-over proceeding at which the state's witnesses are subject to the defendant's cross-examination and the counterbalancing effect of the defendant's own witnesses, the preliminary examination acts as a screening device — eliminating cases in which the state may have been able to establish probable cause for arrest but cannot establish probable cause to hold the defendant for trial. Cf. State v. Perry, supra. (2) The examination also may have a discovery function, giving the defendant a preliminary run-through of the state's case and what amounts to a free opportunity to depose the state's witnesses. See Weinberg and Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing, 67 Mich. L. Rev. 1361, 1396-1399 (1969) 1 Wright, supra, §80, at pp. 137-140; cf. Coleman v. Alabama, 399 U.S. 1 (1970).

There is presumably no Federal or state constitutional right to a preliminary examination serving these additional purposes, at least where the prosecution is upon indictment or information, as all prosecutions under these rules must be. See Sciortini v. Zampano, 385 F.2d 132 (2d Cir. 1967), cert. denied 390 U.S. 906 (1968). The amendment of Federal Rule 5(c), effective October 1, 1972, makes clear that no examination is required in the federal system in prosecutions upon indictment or information. Federal Rule 5.1, promulgated at the same time, allows hearsay evidence to be considered at examinations held in prosecutions upon complaint, thus undermining the screening purpose even in such cases. See Federal Advisory Committee's Note, 56 F.R.D.

143, 149-150, 152-154 (1972). It is improbable that the Supreme Court would impose more rigorous requirements upon state courts. Prior Vermont decisions requiring an adversary post-arrest probable cause hearing should be read as reflecting the Court's concern for a proper review of probable cause to arrest under the former system permitting an arrest warrant to issue upon the state's attorney's information and oath alone. In re Davis, supra; State v. Perry, supra.

In any event, the Vermont rules supply alternative means for meeting the needs which are the object of these two further purposes of the preliminary examination. (1) The screening purpose of the examination is served by various motions to dismiss available under Rule 12, including especially the motion to dismiss for failure to make out a prima facie case provided under Rule 12(e). By that motion the defendant can challenge the factual or legal sufficiency of the prosecution's evidence in advance of trial. See Reporter's Notes to Rule 12(e). The motion must be made after arraignment and in the usual case is to be heard at the omnibus hearing under Rule 12(f), in order to allow time for the completion of discovery. This procedure, however, may be conducted at the time of the Rule 5 appearance or shortly thereafter in a clear case with a single dispositive issue, such as a question of mistaken identity. Rule 5(f) permits the arraignment to be held at the Rule 5 hearing with the consent of the defendant. Under Rule 12(f)(1), on motion for cause shown the court has power to alter the usual 30-day time period between arraignment and the omnibus hearing. The defendant thus in a proper case may immediately upon arraignment join motions for relief under Rule 12(e) and for an immediate omnibus hearing under Rule 12(f)(1), asserting the ripeness and dispositive nature of the issue he presents as cause for the latter motion. (2) The discovery purpose of the preliminary examination is satisfied by the

liberal deposition and discovery procedure available to the defendant under Rules 15 and 16 as implemented through the omnibus hearing provided by Rule 12(f). See Reporter's Notes to Rules 12(f), 15, 16.

Rule 5(d) is based upon Federal Rule 5(c) and ABA Minimum Standards §4.3(b), (c). The judicial officer's statement is the first formal presentation of the charge to the defendant and thus "should take place in such physical surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice." ABA Minimum Standards §4.3(a). To inform the defendant of the charge and give him a copy of it, as provided in paragraph (1), is a necessary preliminary to his formulation of a plea and taking any other defensive steps. A similar requirement existed under prior law. 13 V.S.A. §6551 (repealed by Act No. 118 of 1973, §25). Paragraph (2) implements the requirement of the Public Defender Act, 13 V.S.A. §5234, that the defendant be informed of the right of an indigent to counsel at state expense. Although many defendants may have learned of this right at a prior stage in the proceedings by virtue of the warnings required of the police under Miranda v. Arizona, 384 U.S. 436 (1966), a further warning by the judicial officer is essential to bring home the right to counsel for defendants appearing upon citation or summons and to assure that the right to counsel for all subsequent stages of the proceedings is understood even by defendants already warned. The requirement of 13 V.S.A. §5234 that the Public Defender be notified of an unrepresented defendant continues independent of the rule. Note that by virtue of Argersinger v. Hamlin, 407 U.S. 25 (1972), and 13 V.S.A. §5201(a)(4), as amended, the right to counsel attaches whenever imprisonment may be imposed upon conviction. See Reporter's Notes to Rule 44.

Rule 5(d)(3) provides for the balance of the Miranda

warning. As with notification of the right to counsel, it is essential that all defendants, whether previously warned or not, understand that their Fifth Amendment rights continue through the formal, judicial stages of the proceedings. See 1 Wright, supra, §78. Paragraphs (4) and (5) are added to make sure that on the practical level the defendant understands the context in which he must exercise his rights. It is particularly important to the workings of the pretrial release system under Rule 46 and 13 V.S.A. §7553a that the defendant be aware of its availability and terms. Further, the defendant without a lawyer must have a clear understanding of the procedural steps that are to follow, so that he may either obtain counsel or properly prepare for his own defense.

Rule 5(e) is based upon ABA Minimum Standards §4.3(d). As prior Vermont law recognized, the right to counsel can be effective only if adequate time for consultation is allowed. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968). Cf. In re Clarence Robinson, 125 Vt. 343, 215 A.2d 525 (1965). Under the rule, assignment of and consultation with counsel must be allowed before any further steps are taken at the Rule 5 hearing. If the arraignment itself is to be held at the hearing, as permitted by Rule 5(f), counsel must be present, for arraignment is a "critical stage." Hamilton v. Alabama, 368 U.S. 52 (1963); White v. Maryland, 373 U.S. 59 (1963). The decision as to when to plead is so intertwined with the decision what to plead that counsel must be assigned prior to the Rule 5(f) determination. See ABA Minimum Standards (Pleas of Guilty) §1.3, Commentary. Likewise, the Supreme Court has indicated that a preliminary hearing at which bail is set is a "critical stage," in part because of the importance of a lawyer's arguments on the right to and conditions of release. See Coleman v. Alabama, 399

U.S. 1 (1970). The assignment of counsel must hus precede the release hearing under Rule 5(g) as well.

Rule 5(f) makes clear that the arraignment s in form a proceeding separate from the Rule 5 hearing. ee Rule 10 and Reporter's Notes thereto. The rule reflects ractice under 13 V.S.A. §6551 (repealed by Act No. 18 of 1973, §25), which allowed the defendant to defer his plea until at least twenty-four hours after receiving a copy o the indictment or information. The delay could be waivd, however. In re Robinson, 125 Vt. 343, 215 A.2d 525 (196). Accordingly, the common practice was for the arraigment to be held at the bail hearing. Under the rule, if the judicial officer before whom the defendant appears is a judge othe court in which the offense will be tried, the defendant nay request that the arraignment be held immediately as parof the Rule 5 hearing. If the defendant does not request imediate arraignment, the judicial officer is to set a place, dte, and time for arraignment according to the mutual conveience of the parties and the court. The time set may be whin twenty-four hours only if the defendant requests it.

Under Rule 5(g), the pretrial release heang required under Rule 46 and 13 V.S.A. §7553a is to be hd as part of the Rule 5 appearance. See ABA Minimum Sndards §4.3(e). At this hearing, conditions of release penng trial will be set for arrested defendants released temprarily under Rule 5(b), as well as for those who have remaind in custody pending appearance. A defendant who has apeared in response to a citation or summons, however, ornarily need not be subject to conditions of release pending ial. The release decision resulting in the issuance of th citation or summons will be the basis for the defendant's ontinued release, unless the state moves under Rule 46(b) o have conditions of release imposed for cause shown. Se Reporter's Notes to Rule 46.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; OMNIBUS HEARING

(a) PLEADINGS AND MOTIONS. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and the defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Unless otherwise ordered for cause under subdivision (g) of this rule, the following must be raised prior to trial if then known to the party:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding); or

(3) Motions to suppress evidence on the ground that it was illegally obtained; or

(4) Requests for discovery under Rule 16 or 16.1; or

(5) Request for a severance of offenses or defendants under Rule 14.

(c) MOTION DATE. Except as otherwise provided in these rules or as otherwise ordered by the court, all motions and other requests prior to trial shall be made at or before the omnibus hearing provided in subdivision (f) of this rule.

(d) RULING ON MOTION. A motion made before trial

shall be determined at the omnibus hearing, but the court, if neither party would be prejudiced, may order that it be deferred for determination at the trial of the general issue or until after verdict. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(e) MOTION TO DISMISS FOR LACK OF PRIMA FACIE CASE.

(1) *Motion.* The defendant may, at any time after arraignment, move for dismissal of the indictment or information on the ground that the prosecution is unable to make out a prima facie case against him. The motion shall specify the factual elements of the offense which the defendant contends cannot be proven at trial.

(2) *Hearing and Determination.* The motion shall be heard at the omnibus hearing or, if discovery is not then complete, upon the completion of discovery. At the hearing, if the prosecution does not establish by affidavits, depositions, sworn oral testimony, or other admissable evidence that it has substantial, admissible evidence as to the elements of the offense challenged by the defendant's motion, or a lesser included offense, sufficient to prevent the grant of a motion for judgment of acquittal at the trial, the court shall dismiss the indictment or information without prejudice and discharge the defendant. If the prosecution has sufficient evidence of a lesser included offense, the court shall enter an order dismissing the offense charged and specifying the lesser included offense remaining for trial. The defendant may cross-examine witnesses and introduce affidavits or further evidence in his own behalf. Any question of law determinative of the issues raised by the defendant's motion that could be raised by motion under subdivision (b) of this rule shall be determined at the hearing held under this subdivision.

(3) *Form of Affidavits.* Affidavits offered by either party shall be made on personal knowledge, shall set forth such

facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify. Sworn or certified copies of all papers or parts thereof referred to in the affidavits or offered independently shall be filed and served with the motion.

(f) OMNIBUS HEARING.

(1) *Hearing; Date.* Upon request of a party, upon the court's own motion, or when necessary to dispose of pending motions, an omnibus hearing shall be held in any case in which a plea of not guilty is entered. Unless otherwise ordered by the court on motion for cause shown, the omnibus hearing shall be held 30 days after the defendant is arraigned.

(2) *Same; Checklist.* At the omnibus hearing the court, on its own motion, using an appropriate check-list form, should

(A) Ensure that standards regarding provision of counsel have been complied with;

(B) Ascertain whether discovery has been completed (including compliance by the prosecution with the requirements of Rule 16(a)(2)) and whether additional discovery will be sought and make necessary orders to expedite all discovery;

(C) Make rulings on any motions or other requests then pending and ascertain whether any additional motions or requests will be made at the hearing or continued portions thereof;

(D) Ascertain whether there are any procedural or constitutional issues which should be considered;

(E) Upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference;

(F) Upon the defendant's request, permit him to change his plea;

(G) Ask the defendant whether he intends to offer evi-

dence of an alibi defense and, if he does, to state for the record or supply to the prosecuting attorney at such later time as the court may direct, the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi;

(H) Ask the defendant whether he intends to rely upon the defense of insanity at the time of the alleged crime, or to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, and, if he does, to state for the record, or supply to the prosecuting attorney at such later time as the court may direct, the names and addresses of the witnesses whom he intends to call to testify in order to establish such defense or defenses; and

(I) If the defendant states his intention to offer evidence of an alibi defense, direct the prosecuting attorney within such time thereafter as the court shall order to inform the defendant of the names and addresses of those upon whom the state intends to rely to establish defendant's presence at the scene of the alleged offense.

(3) *Conduct of Hearing.* Any and all issues may be raised by counsel or the court without prior notice and may be informally disposed of at the hearing. If additional discovery, investigation, or preparation, or evidentiary hearing or formal presentation is necessary for the fair and orderly determination of any issue, the hearing shall be continued from time to time until all matters raised are properly disposed of.

(4) *Binding Effect of Stipulations.* Stipulations made by any party or his counsel at the hearing are binding upon the parties at the trial unless set aside or modified by the court in the interests of justice.

(5) *Memorandum.* At the conclusion of the hearing, a

summary memorandum should be dictated into the record or prepared by the court and placed on file, indicating disclosures made, rulings and orders of court, stipulations, and any other matters determined or pending.

(g) Effect of Failure to Raise Issues. Failure by the defendant to present any of the defenses, objections, or requests required by subdivision (b) of this rule to be made prior to trial, or to raise any other pretrial errors or issues of which the party has knowledge, at the times provided in subdivisions (c) and (e) of this rule shall, except as otherwise provided in these rules and subject to constitutional limitations, constitute waiver thereof. The court for cause shown may grant relief from the waiver.

(h) Records. All proceedings at any hearing conducted under subdivision (e) or (f) of this rule or by order of court, including any findings of fact and conclusions of law that are made orally, shall be taken down by a court reporter or recording equipment.

(i) Effect of Determination of Motion. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that the conditions of his release be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any statute relating to periods of limitations.

RULE 12(e). REPORTER'S NOTES

Rule 12(e) is unique to these rules and changes prior practice. In contrast to the Federal Rules and the procedural systems of many states, the Vermont Rules do not provide an automatic preliminary hearing at which the defendant may require the prosecution to present a prima facie case before he is bound over for trial. Rules 4(b) and 5(c) assure that

the constitutional requirement of an independent finding of probable cause to arrest is met. The Vermont Rules, however, proceed on the assumption that there is no constitutional right to a further probable cause hearing as a basis for the binding over, at least where procedures such as the release system provided by Rules 3, 4, and 46; the omnibus hearing required by Rule 12(f); and the broad discovery allowed by Rule 16 are available to prevent unwarranted detention and trial. See Reporter's Notes to Rule 5(c). Further, an automatic preliminary hearing would serve no useful purpose in light of the availability of the omnibus hearing and discovery. Rule 12(e), by contrast to the automatic procedure, provides a narrow form of preliminary hearing, available only on motion, for issues that may be dispositive of the case. Arrest validation and discovery are left to other devices. Under these rules, the defendant is entitled to a full presentation of the prosecution's case only when such a presentation may lead to dismissal of the indictment or information. The Rule 12(e) hearing is thus narrower in scope than the probable cause hearing permitted on motion in prior practice. See In Re Davis, 126 Vt. 142, 224 A.2d 905 (1966); State v. Perry, 131 Vt. 75, 300 A.2d 615 (1973), discussed in Reporter's Notes to Rule 5(c). For the form of motion, see Official Form 21.

Rule 12(e)(1) specifies that defendant's motion is to be grounded on the prosecution's inability to make out a prima facie case and is to state the factual elements in which the prosecution's case is deficient. While there is no sanction against the filing of frivolous or dilatory motions, there is little advantage to the defense in so doing. The motion is, by virtue of Rule 12(e)(2), ordinarily to be heard at the omnibus hearing and may be opposed simply by affidavits if the prosecution so wishes. If the defendant has no substantial basis for his motion, the making of it will neither delay

proceedings nor cause the prosecution the time and expense of a full presentation. Moreover, under Rules 15 and 16, the defendant, prior to the omnibus hearing, can obtain any information about the prosecution's case which a full presentation would provide.

Under Rule 12(e)(1), the motion may be made at any time after arraignment. While ordinarily the motion will not be heard until the omnibus hearing, 30 days later, hearing may be expedited under Rules 5(f) and 12(f)(1) in a clear case with a single dispositive issue such as a question of mistaken identity. See Reporter's Notes to Rule 5(c).

Rule 12(e)(2) is in some respects similar to Civil Rule 56, providing for summary judgment. The prosecution need only show that it has enough evidence to go to the jury on the issue raised by the defendant — that is, that taking the evidence in its most favorable construction to the state it reasonably tends to show defendant's guilt beyond a reasonable doubt. See Reporter's Notes to Rule 29. Moreover, the prosecution may establish its case by affidavits of witnesses as to their potential testimony. See Rule 12(e)(3) (taken from Civil Rule 56(e)). Also, the rule allows the court to narrow the issues by dismissing the offense charged but specifying a lesser included offense for trial. In contrast to the Civil Rule, however, either party may call witnesses and offer real evidence, and the defendant may force the state to a greater degree of proof by cross-examining the state's witnesses or calling them as hostile witnesses. Finally, Rule 12(e)(2) allows questions of law to be decided by the same expeditious procedure.

RULE 15. DEPOSITIONS

(a) WHEN TAKEN. A defendant or the state, at any time after the filing of an indictment or information, may take the deposition of a witness, provided that no deposition

may be taken more than 30 days after arraignment, or after the date set for the omnibus hearing if that date is later, except by leave of court granted for cause shown.

RULE 16. DISCOVERY BY DEFENDANT

(a) PROSECUTOR'S OBLIGATIONS. Except as provided in subdivision (d) of this rule for matters not subject to disclosure and in Rule 16.2(d) for protective orders, upon a plea of not guilty the prosecuting attorney shall upon request of the defendant made in writing or in open court at his appearance under Rule 5 or at any time thereafter

(1) Disclose to defendant's attorney as soon as possible the names and addresses of all witnesses then known to him, and permit defendant's attorney to inspect and copy or photograph their relevant written or recorded statements, within the prosecuting attorney's possession or control.

(2) Disclose to defendant's attorney and permit him to inspect and copy or photograph within a reasonable time the following material or information within the prosecuting attorney's possession, custody, or control:

(A) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a co-defendant if the trial is to be a joint one;

(B) the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant;

(C) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;

(D) any books, papers, documents, photographs (including motion pictures and video tapes), or tangible objects, buildings or places or copies or portions thereof, which are material to the preparation of the defense or which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the defendant;

(E) the names and addresses of all witnesses whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any record of prior criminal convictions of any such witness; and

(F) any record of prior criminal convictions of the defendant.

The fact that a witness' name is on a list furnished under subparagraph (2)(E) of this subdivision and that he is not called shall not be commented upon at trial.

If no request is made, the prosecuting attorney shall, at the omnibus hearing, disclose the foregoing items or state on the record that they do not exist.

(b) SAME: COLLATERAL OF EXCULPATORY MATTER. The prosecuting attorney shall, as soon as possible, after a plea of not guilty,

(1) Inform defendant's attorney,

(A) if he has any relevant material or information which has been provided by an informant;

(B) if there are any grand jury or inquest proceedings which have not been transcribed; and

(C) if there has been any electronic surveillance (including wiretapping) of conversations to which the defendant was a party or of his premises.

(2) Disclose to defendant's attorney any material or information within his possession or control which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce his punishment therefor.

(c) SAME: SCOPE. The prosecuting attorney's obligations under subdivisions (a) and (b) of this rule extend to material and information in the possession, custody, or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who

either regularly report, or with reference to the particular case have reported, to his office.

(d) MATTERS NOT SUBJECT TO DISCLOSURE.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the mental impressions, conclusions, opinions, or legal theories of the prosecuting attorney, members of his legal staff, or other agents of the prosecution, including investigators and police officers.

(2) *Informants.* Disclosure of an informant's identity shall not be required where his identity is a prosecution secret, unless a failure to disclose will infringe the constitutional rights of the defendant, or the identity of the informant is a material fact in a defense to be offered by defendant. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing and trial.

Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF AMICUS CURIAE DADE COUNTY BAR ASSOCIATION

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Respondents.

BRIEF OF AMICUS CURIAE
DADE COUNTY BAR ASSOCIATION

INTEREST OF AMICUS CURIAE

Amicus Curiae, the Dade County Bar Association, is the largest local Bar Association in the southeastern United States. It has a deep and abiding interest in the administration of criminal justice and vindication of constitutional rights in Dade County, Florida. Prior to the institution of this law suit, the Dade County Bar Association attempted to obtain, through legislation, relief for those persons incarcerated in Dade County without a hearing. However, all efforts in the Florida legislature proved to be fruitless.

Subsequently, the Board of Directors of the Dade County Bar Association voted unanimously to seek permission to intervene as Amicus Curiae, on the side of the Respondents in the United States District Court for the Southern District of Florida. The District Court permitted the intervention, and Amicus Curiae filed Memoranda of Law and participated in argument. After the Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit, the Board of Directors again voted unanimously to seek permission to intervene as Amicus Curiae, which permission was granted. In the Fifth Circuit, Amicus Curiae filed a brief and participated in oral argument. After this Court granted the Petitioner's Petition for Writ of Certiorari, the Board of Directors again voted unanimously for permission to participate as Amicus Curiae.

Thus, the Dade County Bar Association has been deeply involved in efforts to secure the Fourth, Fifth and Fourteenth Amendments rights of the residents of Dade County, even before the institution of this lawsuit.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae adopts Respondents' statement of the case and of the facts.

QUESTIONS PRESENTED

I.

THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

II.

THE FOURTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

III.

THE FILING OF AN INFORMATION BY THE PETITIONER DOES NOT OBVIATE THE CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

ARGUMENT

I.

THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

The Fourteenth Amendment provides that no state shall deprive any person of liberty without due process of law. The most fundamental aspect of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545 (1965).

In recent years, this Court has ruled that a hearing must be held *prior* to the deprivation of certain property rights. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), it ruled that a hearing was required prior to the issuance of a writ of replevin; in *Bell v. Burson*, 402 U.S. 535 (1971), it ruled that a hearing was required before a driver's license and vehicle registration could be suspended; in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), it ruled that a hearing was required before the sale of liquor to an individual for one year could be prohibited; in *Goldberg v. Kelly*, 397 U.S. 254 (1970), it ruled that a hearing was required before the termination of welfare benefits; and in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), it ruled that a hearing was required before wages could be garnished.

Therefore, it is inescapable that due process of law *demands* that a person be afforded a prompt preliminary hearing *after* he has been arrested. As the Fifth Circuit said:

> "Incarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis of this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing. Yet the Supreme Court has repeatedly held that such deprivations of property are impermissible." *(Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir., 1973))

The fact that most states have enacted legislation which requires that an arrested person must be promptly taken before a committing magistrate clearly demonstrates the extent to which this policy is engrained in our concept of due process of law. In *McNabb v. United States*, 318 U.S. 332 (1942), after pointing out that this type of legislation appears on the statute books of nearly all the states, this Court said that:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counselled that safeguards must be provided against the dangers of the over-zealous as well as

> the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must, with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent, but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society." *(McNabb v. United States*, 318 U.S. at 343-344).

The statistics cited by the District Court confirm the wisdom of *McNabb*. Between January 1, 1970, and March 31, 1971, the petitioner decided not to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these "no actions" were the result of arrests on charges lacking evidence to justify the filing of an information. The District Court's conclusion is inescapable:

> "Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all of these cases with a tremendous saving of human misery (to all those who had been arrested on insuffficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida)." *(Pugh v. Rainwater*, 332 F.Supp. 1107, 1110 (S.D. Fla. 1971))

II.

THE FOURTH AND FOURTEENTH AMENDMENTS MANDATE THAT A PERSON WHO IS ARRESTED BY STATE OFFICERS IMMEDIATELY BE TAKEN BEFORE A COMMITTING MAGISTRATE IN ORDER THAT PROBABLE CAUSE MAY BE DETERMINED.

The purpose of a prompt preliminary hearing is to determine the existence of probable cause. In *Mallory v. United States*, 354 U.S. 449 (1957), this court stated that:

> "Tht next step (after arrest) in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause be promptly determined . . . " (*Mallory v. United States*, supra at p. 454) (Parenthesis added)

In *Wong Sun v. United States*, 371 U.S. 471 (1963), this court scrutinized an arrest made without a warrant, and dealt with the question of whether the police officers had probable cause to obtain an arrest warrant from a judicial officer on the basis of the information they possessed when they arrested the defendant. Indeed, this court even raised the question of whether the "probable cause" requirements for arrests without warrant might ultimately prove to be stricter than the requirements for arrests with a warrant. In any event:

> "They surely . . . cannot be less . . . Otherwise a principal incentive now existing for the pro-

curement of arrest warrants would be destroyed . . .

* * *

The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complainant officer adduces as probable cause . . . To hold that an officer may act in his own, unchecked discretion on information too vague and too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy.'" (*Wong Sun v. United States*, supra at p.p. 479-482)

The classic explanation of the Fourth Amendment was given by this Court in *Johnson v. United States*, 333 U.S. 10 (1947):

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (*Johnson v. United States*, supra, at p.p. 13-14)

Therefore, it is clear that the Fourth Amendment validity of any arrest must be tested by the criteria which

would be employed by a judicial officer before issuing an arrest warrant. The only way to test the validity of an arrest is to present the arrested person before a neutral and detached judicial officer, who will then determine the existence of "probable cause". Thus, no person may be arrested and incarcerated without a prompt judicial determination of probable cause. *Cooley v. Stone*, 414 F.2d 1215 (D.C. Cir. 1969); *Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971).

III.

THE FILING OF AN INFORMATION BY THE PETITIONER DOES NOT OBVIATE THE CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

The Petitioner is not a neutral and detached magistrate. His position that his mere filing of an information constitutes a conclusive finding of probable cause is totally untenable.

In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), New Hampshire law provided that a prosecuting attorney could also issue a search warrant. Having obtained a search warrant from the prosecutor, the police then searched the petitioner's automobile and obtained incriminating evidence. This Court ruled that the search warrant was invalid. This Court stated that:

"We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued by the state official who is the chief investi-

gator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the constitution, the search stands on no firmer ground than if there had been no warrant at all . . "*(Coolidge v. New Hampshire*, supra, 403 U.S. at 453)

Therefore, this Court concluded that:

" . . . There could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances . . . The whole point of the basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the 'competitive enterprise' that must rightly engage their single-minded attention." (*Coolidge v. New Hampshire*, supra, at p. 450)

If a prosecutor cannot determine the existence of probable cause for the issuance of a search warrant to search an automobile, then certainly he cannot determine the existence of probable cause for an arrest.

Two other recent decisions of this Court refute the petitioner's position that he is capable of acting in a neutral and detached manner. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), this court ruled that a parolee, after arrest, could be returned to custody for violation of parole conditions only after a hearing on probable cause before someone not direc'ly involved. In *Shadwick v. Tampa*, 407 U.S. 345 (1972), this Court set forth the criteria that must

be met for a magistrate to be capable of deciding the existence of probable cause:

" . . . An issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court has long insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v United States*, . . . *Giordenello v. United States* . . . In *Coolidge v. New Hampshire*, supra, the Court last Term voided a search warrant issued by the State Attorney General 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.' " (*Shadwick v. Tampa*, supra, at p. 350)

Moreover, as was pointed out earlier:

"The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is, therefore, divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication . . . " *(McNabb v. United States*, supra, 318 U.S. at p. 343)

The petitioner's contention that the mere filing of an information eliminates the constitutional right to have

probable cause determined by a neutral and impartial magistrate would establish the petitioner as prosecutor, judge and jury. This constitutes an obviously unconstitutional and untenable mixing of functions which this Court properly condemned in *McNabb*, and which the Fifth Circuit condemned in its opinion below:

> "While a magistrate might well arrive at the same decision as to probable cause as the State Attorney, we hold that due process abhors even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system . . . " *(Pugh v. Rainwater*, 483 F.2d at p. 787)

If the petitioner can obviate the constitutional right to a preliminary hearing by the mere filing of an information, then an attorney for a criminal defendant should be able to file an affidavit stating that there is no probable cause to detain his client, and thus have him released. Defense counsel is as equally disinterested as is the Petitioner, and can certainly provide as fair, impartial and accurate an assessment of the situation as can the Petitioner.

Thus, the Petitioner's position would undermine a fundamental basic requirement of our accusatorial system of criminal law. In *Watts v. Indiana*, 338 U.S. 49 (1949), this Court summarized the essence of the accusatorial system:

> "The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, *the right to a prompt hearing before a magistrate*, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise the accused of his constitutional rights — these are all characteristics of the accusatorial system and manifestations of its demands." *(Watts v. Indiana*, supra, at pp. 54-55) (Emphasis added)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was forwarded by mail to N. Joseph Durant, Assistant State Attorney, Counsel for Petitioner, 1351 N. W. 12th Street, Miami, Florida; Bruce Rogow, Esq., City National Bank Building, Miami, Florida, Counsel for Respondents; Phillip A. Hubbart, Public Defender, Counsel for Respondents, 1351 N. W. 12th Street, Miami, Florida 33125, and Raymond Markey, Assistant Attorney General, Counsel for Amicus Curiae, State of Florida, Office of the Attorney General, Tallahassee, Florida, this_____ day of_____, 1974.

_____
Attorney

Supreme Court, U. S.
FILED
OCT 7 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

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Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

INTRODUCTORY STATEMENT

This case was originally argued on March 25, 1974. Several weeks later, the Court ordered reargument. Subsequently, the Court invited the Solicitor General of the United States to submit his views on the issues presented, and the Attorney Generals of the fifty states were issued similar invitations.

Nine of the states[1] and the Solicitor General have filed amicus curiae briefs. The Respondents submit this brief to reply to the states' views and to address the questions of mootness and jurisdiction which concerned the Court during the initial argument. In addition, the brief will focus upon the more recent decisions of this Court which are relevant to the case. The views of the Solicitor General, submitted only recently, are addressed in a Second Supplemental Brief for Respondents.

This brief supplements the original arguments submitted by the Respondents. The authorities cited therein retain their validity. The intervening decisions of this Court merely reaffirm that: (1) The Due Process Clause requires preliminary hearings for defendants incarcerated prior to trial solely upon a State Attorney's information; (2) This case is not moot because it is a classic example of the "capable of repetition, yet evading review" exception to the mootness doctrine; (3) *Preiser v. Rodriguez*, 411 U.S. 475 (1973) offers no bar to the maintenance of this action.

Before addressing each of those points, it is important to remind the Court of the factual and procedural background of this case.

THE FLORIDA PROCEDURES WHICH PRESENT THE CONSTITUTIONAL QUESTIONS.

In Florida, criminal actions are usually initiated by informations filed by a state attorney or one of his assistants. The informations are based upon facts

[1] Massachusetts, Georgia, Vermont, Utah, Washington, Louisiana, New Jersey, Texas and California.

presented to the State Attorney's office by police officers (App. 47-50). The filing of an information constitutes a binding determination of probable cause which justifies the detention of a defendant until trial. As the Florida Supreme Court put it:

> When a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial.
>
> *State ex rel. Hardy v. Blount*, 261 So.2d 172, 174 (Fla. 1972).

The Florida Rules of Criminal Procedure, Rule 3.131(a) and (b), provide for preliminary hearings for felony defendants if no information is filed within 96 hours after the defendants first appearance. (Accused misdemeants are never entitled to probable cause hearings). The first appearance, which is to set bail and inform the defendant of his rights, takes place within 24 hours of arrest. Rule 3.130, Florida Rules of Criminal Procedure. Thus, a state attorney has at least five days in which to obviate a preliminary hearing by filing an information.[2]

Of course, even if a preliminary hearing is held, and no probable cause found, the state attorney can overrule the magistrate's decision.

[2] Actually a state attorney has at least seven days to act, since Rule 3.040 of the Florida Rules of Criminal Procedure provides that Saturdays, Sundays and holidays are to be excluded in the computation when the period of time involved is less than seven days. The Rules which set the time frames mentioned above were implemented after the District Court decision in this case. At that time, a month or more sometimes passed between arrest and first appearance while the State Attorney was processing the information (App. 56-57, 47-48).

> . . . even if a defendant were granted a preliminary hearing and the committing magistrate discharged the defendant for lack of probable cause, the prosecuting attorney could nevertheless determine that probable cause exists and file an information charging the defendant with the commission of the offense.
>
> *State ex rel. Hardy v. Blount,* 261 So.2d at 174.

The effect of the Rules and Florida Supreme Court decisions is to make state attorneys the final arbiters of probable cause. Absolutely no remedy exists to review a finding of probable cause which flows from an information. The filing of a habeas corpus petition would be futile because the prosecutor's action is conclusive. *State ex rel. Hardy v. Blount,* 261 So.2d at 174. A Motion to Dismiss the information under Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure is unavailing because the State need merely traverse or demur to the Motion and it will be denied. Rule 3.190(d). Consequently, even if one argued that due process is protected by a defendant's ability to initiate a right to be heard on probable cause, the argument would be devoid of merit in the Florida scheme.[3]

The question presented by the Florida practice has

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[3]The Respondents submit that as a due process matter, it is the State, not a defendant, who must initiate the hearing process. If there is a constitutional right to be heard shortly after arrest, then waiver of that right must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). That waiver cannot be presumed from a silent record. *Carnley v. Cochran,* 369 U.S. 506, 516 (1962). Only if the State makes clear offer of a preliminary hearing can the constitutional standards begin to be met. Compare *Morrissey v. Brewer,* 408 U.S. 471 (1973).

been constant throughout this litigation. Is a person held in custody upon a State Attorney's information constitutionally entitled to a prompt judicial hearing to determine if probable cause exists to deprive him of his liberty?

I.

THE RECENT DECISIONS OF THIS COURT REAFFIRM THE PRINCIPLE THAT DUE PROCESS REQUIRES THAT THE TAKING OF ABSOLUTE LIBERTY BE FOLLOWED BY A PROMPT JUDICIAL HEARING TO DETERMINE PROBABLE CAUSE.

The arrest and incarceration of a person suspected of having committed a crime deprives him of his unencumbered, absolute right to liberty. People convicted of crimes, whose rights to liberty are merely conditional, i.e., parolees and probationers, are entitled to "preliminary hearings" to determine if probable cause exists to consider termination of their parole or probation. *Morrissey v. Brewer,* 408 U.S. 471, 485 (1972), *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). The Respondents, whose claim to liberty is stronger, merely ask for similar treatment.

The Court's recent decisions reinforce the due process contentions made in Respondents' original brief and oral argument.

In *Mitchell v. W.T. Grant Company,* ____ U.S. ____, 94 S.Ct. 1895, 40 L.Ed.2d 406 (May 13, 1974), the Court retreated from the broad rule announced in *Fuentes v. Shevin,* 407 U.S. 67 (1972) which required a

hearing *before* personal property could be temporarily taken. *Mitchell* upheld a Louisiana sequestration statute which provided for hearings immediately *after* the property was seized. The Court took pains to point out that the Louisiana practices offered more protection than did the Florida statutes struck down in *Fuentes*. In the parish where *Mitchell* arose, before a writ of sequestration could be issued:

> . . the requisite showing must be made to a judge and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits.' Art. 3506.
>
> *Mitchell v. W.T. Grant Company*, ____ U.S. ____, 94 S.Ct. at 1904-1905, 40 L.Ed.2d at 419. (footnote omitted).

The Florida procedure for depriving a person of liberty via an information contains none of those safeguards. There is no judicial control over the issuance of the information nor is there judicial review of the information before trial. Damages and attorneys fees are not available upon a finding of no probable cause or an acquittal.[4]

[4]Such damages might be available if one could show a knowing and malicious false arrest. But the cases which are most affected by preliminary hearings are those in which the officer believed he made a valid arrest, only to learn later that he had the wrong person, or a witness no longer could identify him, or that indeed, no actual crime had been committed. Those good faith arrests should not be subjected to civil damage actions. If every discharged arrestee could maintain such suits prosecutors and police would be unable to function. The only remedy for a good faith taking of liberty which is later determined to lack substance is the speedy return of liberty. Only a prompt preliminary hearing can mitigate the potential harm.

At issue in *Mitchell* was personal property (a stove, stereo, refrigerator and a washing machine) in which the buyer and the seller shared interests. The property was never wholly the buyer's. Down payments were made and the vendor transferred possession to the purchaser but retained a right to the goods until payment was completed. Mr. Mitchell had conditional possession of the merchandise. At issue in this case is liberty which is absolutely possessed until the State acts. Certainly, if the taking of the Mitchell property requires an opportunity for an immediate hearing, subsequent to the sequestration, the taking of liberty cannot require less.

Mitchell, Calero Toledo v. Pearson Yacht Leasing, ____ U.S. ____, 94 S.Ct. 2080, 40 L.Ed.2d 452 (May 15, 1974) and *Arnett v. Kennedy*, ____ U.S. ____, 94 S.Ct. 1633, 40 L.Ed.2d 15 (April 16, 1974) all have reaffirmed the need for flexibility in determining what process is due. The Respondents' position respects that concern. As they stated in their original brief, at page 13:

> The Government function involved here is the State's duty to charge and arrest persons suspected of the commission of a crime. An adversary hearing prior to the exercise of that function

might undermine the State's ability to apprehend a suspect. The accommodation which the plaintiffs urge – a prompt hearing subsequent to arrest – protects the Government interest and the private interests, the fundamental right to absolute liberty.

A hearing is mandated by the due process decisions of this Court.

II.

THIS CASE IS NOT MOOT.

A. The "Capable of Repetition Yet Evading Review" Doctrine.

The right to be heard at a preliminary probable cause hearing arises in the time between arrest and trial. In Florida, the speedy trial rule calls for felony cases to be heard within 180 days of arrest and misdemeanors must be called for trial within 90 days. If a demand for a speedy trial is made, the time shrinks to 60 days from the date of the demand. Florida Rules of Criminal Procedure, Rule 3.191(a)(1) and (2). The Respondents and the class they represent contest the State's ability to deprive them of their liberty during that time solely upon a prosecutorial information. Once a trial is held, their claim evaporates.[5] Consequently, the passage of

[5]It is important to reiterate that the Respondents do not claim that a preliminary hearing is a prerequisite to a fair trial. The issue here is whether a pretrial deprivation of liberty may be fairly accomplished without a preliminary hearing. Respondents' Brief, pp. 30-31. The State of Florida and several of the amicus curiae briefs overlook this distinction when they rely upon cases which hold that preliminary hearings are not required by the Due Process Clause. Without exception, those cases involved an attempt to reverse an otherwise valid conviction because a preliminary hearing was denied. That argument has never been made in this case. It is singularly inappropirate because Florida has broad pretrial discovery which enables a defendant to extensively prepare for trial. Florida Rules of Criminal Procedure, Rule 3.220. Thus the focus of this case is narrow. It is concerned only with the pretrial loss of liberty upon an information.

time will invariably prevent a complaining plaintiff from directly benefiting from the hearing he sought. Pugh and Henderson, although they were members of the denied class when they filed their suit in March, 1971, no longer are in need of a preliminary hearing. They have been tried.

This case is a classic example of the "capable of repetition yet evading review" doctrine enunciated in *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). It meets the dual test of the rule.[6] The denial of preliminary hearings continue under the Florida practices. The claims continually evade review because of the short time in which they ripen. The analogy to the *Southern Pacific* progeny, i.e., *Moore v. Ogilvie*, 394 U.S. 814, 816 (1972) and *Roe v. Wade*, 410 U.S. 113, 125 (1973) is apt. In each of those cases the Court found that the issues presented (validity of voter residence requirements and the Texas abortion statute) were "capable of repetition yet evading

[6]See the dissenting opinion of Mr. Justice Marshall in *Richardson v. Ramirez*, ____ U.S. ____, 94 S.Ct. 2655, 2675-2679, 41 L.Ed.2d 551, 557-580 (June 24, 1974). In concluding that the claim was moot, Justice Marshall points to all the reasons which compel the conclusion that Pugh's claim is not moot under the *Southern Pacific* rule.

review." Therefore the Court decided the questions, even though the named plaintiffs no longer suffered the deprivation originally claimed. The plight of those denied preliminary hearings is equally within the evading review doctrine.[7]

There is an additional argument for the mootness exception in the case at bar. It is found in *Sibron v. New York*, 392 U.S. 40 (1968):

> Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process – in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct.
>
> *Id.* 392 U.S. at 52-53.

The Respondents and their class would be placed in that quandary if the Court declined to act.

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[7]It may even be a more compelling example. The Fifth Circuit called for the hearings to take place between four and seven days from arrest. *Pugh v. Rainwater*, 483 F.2d 778, 788 (5th Cir. 1973). Every subsequent day without a preliminary hearing gives rise to an irreparable deprivation of liberty. Compare *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). So it may be said that the time for vindication of the right to be heard is but five to eight days after arrest. A far shorter time than that involved in the voting and abortion cases.

B. The Unnamed Class Members Perpetuate The Controversy.

At the time the Respondents and other intervening plaintiffs filed suit they were part of a class of persons arrested by law enforcement officers in Dade County, Florida who were incarcerated upon informations filed by State Attorney Gerstein and therefore denied preliminary hearings (App. 3). The District Court determined that the case was properly maintained as a class action. *Pugh v. Rainwater*, 332 F.Supp. 1107, 1115 (S.D. Fla. 1971).

Since the Respondents no longer are part of the class, the Court, at oral argument, expressed some doubt about the ability of unnamed class members to perpetuate the controversy in light of *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973). (Tr. of Oral Arg. 38-39). See also, *Richardson v. Ramirez*, ____ U.S. ____, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551, 562 (1974). In *Burney*, the named plaintiff's unemployment insurance benefits were terminated without a prior hearing. Several months later she received a hearing in the Indiana Employment Security Division and eventually was reinstated with complete retroactive compensation.

Burney is distinguishable from this case. First, the claims of Mrs. Burney and her class did not evade review. It was possible that the termination of unemployment insurance without a prior hearing could still pose a back payment problem after the post-termination hearing. In order to resolve that dispute the Court would have to address the need for a prior

hearing. Thus, the *Southern Pacific* doctrine was not applicable.[8]

In addition, persons denied pre-termination hearings could eventually be made whole, as was Mrs. Burney. But the effect of a denied preliminary hearing is different. Liberty, once lost, is not retrievable. Money damages, even if appripriate,[9] cannot replace freedom. So the question initially posed by Pugh is very much alive. The present and future members of the class originally represented by the Respondents perpetuate the controversy. They are daily denied an opportunity to be heard. If that opportunity is commanded by the Constitution, only this Court can articulate it and end the dilemma.

III.

PREISER V. RODRIGUEZ, 411 U.S. 475 (1973) POSES NO BAR TO THIS ACTION.

Preiser v. Rodriguez, 411 U.S. 475 (1973) held that when state prisoners challenged "the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U.S. at 500, with the concomitant requirement of exhausting state remedies." *Wolff v. McDonnell*, ____ U.S. ____, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935, 949 (June 26, 1974).

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[8] *Richardson v. Ramirez*, ____ U.S. ____, 94 S.Ct. 2655, 2678-2679, n. 12, 41 L.Ed.2d 551, 579-580 (1974) (Mr. Justice Marshall, dissenting).

[9] See footnote 4, *supra*.

The Respondents in this case, proceeding under Title 42 U.S.C. §1983, did not challenge the fact or duration of their confinement. But even if their challenge were read differently and habeas corpus was the proper vehicle, the District Court had jurisdiction since state remedies were non-existent. Therefore exhaustion was not required and the suit could be treated as a habeas corpus petition.

A. There Was No Challenge To The Fact Or Duration Of Confinement.

The Court described the relief sought in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) this way:

> Alleging that the Department had acted unconstitutionally in depriving them of the [good time] credits, they [the plaintiffs] sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison.
>
> *Id.* 411 U.S. 476-477.

In *Wolff v. McDonnell*, ____ U.S. ____, 94 S.Ct. 2963, 41 L.Ed.2d 935, the plaintiff similarly sought *inter alia*, "restoration of good time." *Id.* at 2963.

The plaintiffs in *Pugh* never requested relief which would have directly returned their liberty or shortened the duration of their confinement. They asked that the defendants be enjoined:

> from failing to accord plaintiffs and members of their class due process hearings immediately after arrest to determine whether or not probable cause exists for the detention of the plaintiffs and their class. (App. 12).

By granting that relief, the Courts below merely provided a procedural mechanism to test the State Attorney's information. There was no automatic release from confinement flowing from the decisions. Nor did the plaintiffs want the federal court to release them from custody. They did not contend that their custody was illegal. Throughout, they have recognized that the State had the power to arrest and hold them for a short time without a hearing.[10] It was the denial of a hearing which they claimed to be illegal. They wanted only the right to be heard. If, after a preliminary hearing, a State magistrate found no probable cause, the release from custody would be his decision.[11]

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[10] Respondents' Brief, p. 13, Tr. of Oral Arg. 54-55.

[11] In the order which provided for a preliminary hearing plan, the District Court, as a sanction, called for release if no preliminary hearing was granted. *Pugh v. Rainwater*, 336 F. Supp. 490, 493 (S.D. Fla. 1972). But that was merely an enforcement measure which assumed possible non-compliance with the District Court's substantive order. The Fifth Circuit thought the sanctions inappropriate and vacated them. *Pugh v. Rainwater*, 483 F.2d at 790. No one contests that ruling and thus release, in any form, is not an issue here.

Had the Respondents sought habeas corpus relief, the District Court would have been put in the position of ordering many defendants released from physical custody unless preliminary hearings were granted. Not only would that have caused unnecessary federal-state friction, it would have avoided the issue. The pretrial releases would not provide an opportunity to determine probable cause. The defendants then would be in a different form of custody. *Cf. Hensley v. Municipal Court*, 411 U.S. 345 (1973), which would permit them to renew their habeas corpus actions. The only effective relief available then would be for the District Court to order preliminary hearings or outright dismissal of the prosecutions. That gross interference

Unlike the plaintiffs in *Preiser* and *Wolff*, the Respondents custody could only be affected by a State decision on probable cause. Since they sought only the right to be heard, and not the right to liberty, their challenge was not to the fact or duration of their custody and *Preiser* is inapplicable.

B. If *Preiser v. Rodriguez* Is Applicable, the Respondents Have Satisified Its Requirements and This Court Should Act On The Merits.

There is no question that an attempt to seek habeas corpus relief in the Florida courts would be futile. The Florida law is adamant. A prosecutor's information determined probable cause and no preliminary or judicial inquiry of any kind can review that decision. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972). Florida Rules of Criminal Procedure, Rule 3.131(a). A petitioner need not attempt to exhaust futile remedies. *Preiser v. Rodriguez*, 411 U.S. at 493; *Wilwording v. Swenson*, 404 U.S. 249 (1971). Therefore no jurisdictional barrier prevented the Respondents from maintaining a habeus corpus action in the District Court under Title 28 U.S.C. §2254.

If the Court concludes that habeas corpus is the proper mode of relief, the Court should redesignate this action as a habeas corpus petition and reach the merits

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with state court proceedings would be unnecessary if the form of relief were injunctive. Failure to honor the injunction and provide hearings would subject the State Attorney to contempt proceedings. But the chance of that happening is non-existent, for there can be no doubt that the State Attorneys in Florida will abide by an order of this Court. Therefore a § 1983 action was proper both as a matter of law and as a method of minimizing the federal role.

of the claims. That would be consistent with this Court's statement in *Conley v. Gibson*, 335 U.S. 41 (1957):

> Following the simple guide of Rule 8(f) [Federal Rules of Civil Procedure] that 'all pleadings shall be so constructed as to do substantial justice', we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one mis-step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. 355 U.S. at 48.

Choosing the wrong theory of relief does not bar any relief. *Dotschay v. National Mutual Insurance Co.*, 246 F.2d 221, 223 (5th Cir. 1957), 2A *Moore's Federal Practice* § 8.14.[12]

It would even be appropriate to treat the case as a class action habeas corpus under Rule 23(b)(2), Federal Rules of Civil Procedure. *Williams v. Richardson*, 481 F.2d 358, 361, (8th Cir. 1973).

If *Preiser* is pertinent, redesignation is sensible because it will be judicially economical. Since 1971, the *Pugh* case has been the subject of three District Court

[12]Fair notice has been had by all interested parties. Every relevant governmental legal office was represented in the initial phases of this case. The Florida Attorney General's office, the State Attorney's office and the Dade County Attorney's office fully participated in the District Court. On the appeal, only the State Attorney's office contested the preliminary hearing issue. Thus, no interest would be unprotected by the redesignation of the action from a §1983 suit to habeas corpus.

decisions, one Fifth Cicuit ruling and two oral arguments in this Court. Dismissal of the complaint now would result in a habeas corpus petition being filed in the District Court. The same road would be retraced, for ultimately this Court must resolve the questions presented by the Respondents.

IV

THE AMICUS CURIAE BRIEFS OFFER NO THEORY WHICH JUSTIFIES REVERSAL OF THE DECISION BELOW.

Nine of the fifty states accepted the Court's invitation to submit their views on this case. From their briefs, it appears that only one, the State of Washington, shares a pre-trial procedural system which closely resembles Florida's and would therefore be substantially affected by an affirmance. New Jersey and Massachusetts would be unaffected. California and Texas share concern over preliminary hearings for misdemeanants since felony defendants are entitled to probable cause determinations in these states. An affirmance would require several changes in the Vermont procedures for both felony and misdemeanor cases. The extent to which Utah, Georgia and Louisiana would be affected is not clear from their respective briefs.

At the time this brief was prepared for timely submission to the Court, the Solicitor General's arguments had not been filed. On October 1, 1974 a manuscript copy of his brief was provided to

Respondents' counsel. A separate, Second Supplemental Brief is being filed in response to the Solicitor General.

The submitted amicus curiae briefs echo the arguments previously made by Florida. A concern over comity, and reliance upon the early indictment-information decisions are common threads among them. The Respondents have addressed nearly all of those arguments in their original brief, in oral argument, or in this brief. But a short reply to several of the amicus curiae suggestions is necessary.

A. The Comity Issue.

Younger v. Harris, 401 U.S. 37 (1971), is a recurring authority in the briefs of several states. However, each has neglected to accurately assess the scope of the relief sought and the unavailability of state remedies. Those factors make *Younger v. Harris* inapplicable.

Unlike *Younger*, *Samuels v. Mackell*, 401 U.S. 66 (1971) or *Perez v. Ledesma*, 401 U.S. 82 (1971), a declaratory judgment and an injunction compelling preliminary hearings would *not* "effectively stifle the then pending state criminal prosecutions." *Younger v. Harris*, 401 U.S. at 84. The Respondents did not seek a federal determination of probable cause. They asked the federal court to decide if someone other than a prosecutor must determine probable cause. The lower court orders placed the determination in the hands of the state judiciary. Any impact upon state court proceedings would occur only when a state magistrate decided that no valid resaon existed to hold a person

for trial. Consequently, the strictures of *Younger* do not apply to this case.[13]

Even if *Younger* were applicable, the case at hand would be an exception to its principles because: (1) The Respondents cannot be protected in state courts; (2) great and immediate irreparable injury (loss of liberty) is present; and (3) the threatened constitutional deprivation cannot be eliminated by a single defense to the state prosecution.[14] Massachusetts concedes as much when it states: "The amicus curiae would not, however, contend that federal intervention cannot occur where the state proceeding does not allow an individual to raise a federal constitutional claim." Massachusetts Brief, pp. 15-16.

It is uncontroverted that an information is an inviolable determinant of probable cause, *State ex rel.*

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[13]Compare, *Steffel v. Thompson*, ____U.S. ____, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), which permitted a declaratory judgment to be issued against threatened prosecutions. Although no pending action is threatened by an anticipatory declaratory judgment, the final effect is federal foreclosure of a state criminal proceeding. In contrast, *Pugh* poses absolutely no intrusion. State prosecutions, pending or threatened, can always be carried out if the state magistrate finds probable cause.

[14]The mere denial of a preliminary hearing is not a defense to a criminal prosecution. *Scarborough v. Dutton*, 393 F.2d 6 (5th Cir. 1968). Cf. *Coleman v. Alabama*, 399 U.S. 1 (1970). See also, *Bradley v. State*, 265 So.2d 532 (Fla.App. 1972), cert. denied, 411 U.S. 916 (1973). Recognizing those holdings to be sensible, the Respondents never sought to obviate otherwise valid convictions. Florida's broad discovery rules underscore the fact that a fair trial is possible in the absence of a preliminary hearing. For these reasons, the "single defense" which *Younger* contemplates has no meaning when preliminary hearing is denied.

Hardy v. Blount, 261 So.2d 172 (Fla. 1972); *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); Rule 3.131(a), Florida Rules of Criminal Procedure. Massachusetts is in error in suggesting that a motion to dismiss the information for lack of probable cause provides a means of raising the federal claim. Massachusetts Brief, pp. 16-17. The applicable Florida Rule of Criminal Procedure, Rule 3.190(d), mandates that such a motion be denied if the state attorney files a traverse or demurrer under oath. That is nothing more than a reaffirmation of the information which once again terminates probable cause review.

It is obvious that a loss of liberty constitutes irreparable injury. The combination of that injury, the unavailability of state remedies, and the limited federal relief sought, makes the equitable restraint doctrine of *Younger v. Harris* inappropriate in this proceeding.

B. The Right to a Preliminary Hearing is a Constitutional Right.

The amici curiae resist the Respondent's arguments by relying upon *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914), and some more recent cases in which the information process was never at issue: *Costello v. United States*, 350 U.S. 359, 363 (1956); *Lawn v. United States*, 355 U.S. 339, 349 (1958). A reading of those cases makes it apparent that each of them responded to questions which differ from those posted here. No cases yet

decided by this Court bar the relief sought by the Respondents. On the contrary, the cases which are most closely analogous (and much more recent) present due process and Fourth Amendment principles which firmly support the Respondents' position. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The amici curiae have failed to distinguish those cases from this one.

Instead, an effort has been made to seek shelter under the Federal Rules of Criminal Procedure which permit informations to determine probable cause in misdemeanor prosecutions. Rule 5(c), Federal Rules of Criminal Procedure. The mere existence of a federal rule does not answer the constitutional issue posed by the Florida practices. If the Respondents are correct, the federal procedures, to the extent that they permit pre-trial incarceration on prosecutorial probable cause, would also be invalid.[15]

The issue in this case has always been: May a prosecutor, by filing an information, deprive a person of liberty for a substantial period of time prior to trial without a hearing? The deprivation of liberty places a defendant in a "'brutal need' situation." *Mitchell v. W.T. Grant Co.*, ____ U.S. ____, 94 S.Ct. 1895, 1909, 40 L.Ed.2d 406, 474 (1974) (Justice Powell, concurring). A few days in jail may result in the loss of a job, loss of home

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[15]See the original Brief for Respondents, pp. 22-26, 31-32, for their arguments regarding misdemeanor preliminary hearings and the impact upon the federal practices.

and car, and family reliance upon welfare.[16] None of the amici curiae have shown a competing governmental interest which overrides the need for a prompt judicial determination of probable cause after arrest.

The Attorney General of Washington hypothesizes that preliminary hearings are not functionally important enough to make them constitutionally "imperative." Washington Brief, p. 18. But that assessment overlooks the positive attributes which flow from preliminary hearings: Early release for innocent people; reduced charges in overstated cases; entry of pleas at an early stage; rapid determination of the need for psychiatric determinations. These, and other reasons, have led the National Advisory Commission on Criminal Justice Standards and Goals to conclude that prompt preliminary hearings should be held in felony cases. *Report on Courts*, Standard 4.5 (1973). This Court has recognized the important functions of preliminary hearings. *Coleman v. Alabama*, 399 U.S. 1 (1970). Even the commentator relied upon in the Washington Brief recognizes that preliminary hearings can play an important and beneficial role in the administration of criminal justice. Anderson, *The Preliminary Hearing – Better Alternatives or More of the Same?*, 35 Mo.L.Rev. 281 (1970). The fear of a diminished prosecutorial role

[16]The Court said in *Baldwin v. New York*, 399 U.S. 66, 73 (1970):

> The prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation.

That comment was reinterated in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

is unfounded. Those officials will continue to make initial determinations to prosecute or to decline to press charges. They will remain the primary screening force. Only after a prosecutor has exercised his option will judicial review become a constitutional necessity.

Finally, an affirmance by this Court will not have an unsettling effect upon the administration of criminal justice. Every jurisdiction has statutes or rules which envision preliminary hearings. Brief for Respondent's Appendix, pp. 1a-2a. Many of the states, including some of the nine which submitted amicus curiae briefs, already provide probable cause hearings to accused defendants. Even if pessimism were a legitimate response to constitutional arguments, such an attitude exhibits an unwarranted lack of faith in our ability to provide justice. Recent experience has shown that the Chief Justice was correct when he wrote in *Argersinger v. Hamlin*, 407 U.S. 25 (1972):

> The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.
>
> *Id.*, 407 U.S. at 44 (Concurring opinion).[17]

As a result of the original decision in this case, Dade County implemented a preliminary hearing plan which resulted in a twenty-five percent reduction in felony caseloads. *Pugh v. Rainwater*, 483 F.2d at 787. Thus the facts of this case compel the conclusion that an affirmance will enhance the efficient administration of criminal justice.

[17]In 1973, seven states adopted full-time, state-wide public defender systems in response to *Argersinger*. National Legal Aid and Defender Association, *Washington Memo*, Vol. III, August 1974, p. 2.

CONCLUSION

For the reasons advanced above and in the original Brief for Respondents, the decision below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, PETITIONER

v.

ROBERT PUGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States is filing a brief in this case as *amicus curiae* at the request of the Court.[1] The issue in which the United States has an interest involves the question whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.[2] The court of appeals

[1] Letter to the Solicitor General from the Clerk of the Court dated May 28, 1974.

[2] The other question involved in this case is whether the district court properly exercised jurisdiction to consider respondents' claims in this class action suit for injunctive and declaratory relief, or whether it should have abstained from exercising jurisdiction for reasons of state-federal comity. We do not discuss that question in this brief because

held that the failure to afford such a hearing before a neutral and detached judicial officer deprives such a defendant of due process of law. Its decision also implies that the detention of the accused under such circumstances constitutes an unreasonable seizure of his person in violation of the Fourth Amendment.

While the decision of the court of appeals was rendered in the context of an attack on the system for initiation and maintenance of prosecutions in the State of Florida, the court's constitutional ruling necessarily has application to the criminal justice system of every jurisdiction in the United States, including the federal system.[3] It would follow from adoption of the court of appeals' ruling that Rule 5(c) of the Federal Rules of Criminal Procedure is unconstitutional insofar as that rule provides that "[a] defendant is entitled to a preliminary examination[4] * * * [which] shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody * * *; *provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set*

its resolution will have little if any impact on the administration of criminal justice in federal prosecutions.

[3] In the federal system and in the Superior Court of the District of Columbia, only misdemeanor prosecutions would be effected, since all felonies necessarily are prosecuted by grand jury indictment. U.S. Constitution, Fifth Amendment. In many States, however, both felony and misdemeanor prosecutions are initiated by information.

[4] Throughout this brief, the terms "preliminary examination" and "preliminary hearing" are used interchangeably.

for the preliminary examination" (emphasis supplied). The Federal Magistrates Act would be similarly affected. See 18 U.S.C. 3060(e).[5]

From a pragmatic standpoint, invalidation of the portion of Rule 5(c) set forth above, and the requirement of preliminary hearings in all cases initiated by information, would have relatively little adverse impact on the general federal criminal justice system. In felony cases, defendants in custody will either receive a preliminary hearing or be indicted by a grand jury, so that detention during the period from arrest to trial cannot be based solely upon the decision of the prosecutor to prefer charges.[6] While there are a substantial and growing number of federal misdemeanor prosecutions, the vast bulk of which are proceeded on by information rather than indictment,[7] the nature of the offenses (few of which involve

[5] Although not directly addressing the matter, the reasoning of the court of appeals also calls in question the constitutionality of that portion of Rule 9(a) of the Federal Rules of Criminal Procedure which provides that "[u]pon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information * * *," since the rule apparently mandates the issuance of a bench warrant without any review by the court of the probable cause underlying the prosecutor's charging decision.

[6] In more than 10% of felony cases during 1972, indictment was waived by the defendant. 1972 Annual Report of the Director, Administrative Office of the United States Courts II–52. In such instances, presumably, the waiver could properly be viewed as encompassing a waiver of the right, if any such right were recognized in this case, to have the grand jury's probable-cause-determining function performed by a magistrate.

[7] In fiscal year 1972, there were 10,268 misdemeanor cases commenced by information in the federal district courts. 1972

crimes of violence) and of the defendants makes it relatively rare that misdemeanor defendants are held in custody awaiting trial. Thus, the burden of holding preliminary hearings (or securing indictments) in this limited category of cases would not seriously impair the efficient overall performance of the federal criminal justice system.

There would, however, be a serious impact on the functioning of the local criminal justice system in the District of Columbia. Information supplied by the United States Attorney[8] shows that there are currently approximately 6,500 misdemeanor informations filed annually in the Superior Court of the District of Columbia and that defendants are unable to make bond and are therefore incarcerated pending trial in 15–20% of those cases (many of which do involve crimes of violence). Thus, if this Court adopts the holding of the court of appeals, an already overburdened court system would be required to hold between 1,000 and 1,300 additional preliminary hearings per year.

QUESTION PRESENTED

Whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.

Annual Report of the Director, Administrative Office of the United States Courts, *supra*, at II–52.

[8] The United States Attorney for the District of Columbia serves also in the capacity of local prosecutor for all criminal offenses (with certain exceptions, not relevant here, relating primarily to municipal and police regulations) which are prosecuted pursuant to the District of Columbia Code in the Superior Court of the District of Columbia. See 23 D.C. Code 101.

FEDERAL STATUTE AND RULES INVOLVED

18 U.S.C. 3060 provides in pertinent part:

> (a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.
>
> * * * * *
>
> (d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.
>
> (e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.
>
> * * * * *

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part:

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) *In General.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

* * * * *

(c) *Offenses Not Triable by the United States Magistrate.* If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement

made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

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Rule 5.1 of the Federal Rules of Criminal Procedure provides in pertinent part:

PRELIMINARY EXAMINATION

(a) *Probable Cause Finding.* If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) *Discharge of Defendant.* If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

* * * * *

Rule 9 of the Federal Rules of Criminal Procedure provides in pertinent part:

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * *

STATEMENT

On March 22, 1971, respondents Pugh and Henderson, subsequently joined by intervening respondents Turner and Faulk, filed a class action suit in the United States District Court for the Southern District of Florida against various Dade County, Florida officials, including petitioner Gerstein, the Dade County State Attorney. At the time the suit was filed, respondents Pugh and Henderson were incarcerated in the Dade County Jail upon informations filed by the State Attorney, as permitted by Article I, Section 15(a) of the Florida Constitution. Respondents sought an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment.

On October 12, 1971, the district court issued an opinion and judgment declaring unconstitutional the Florida practice of denying a judicial determination of probable cause to persons proceeded against by in-

formation and concluding that arrested persons, whether or not released on bond, have a constitutional right to a judicial hearing on the question of probable cause (Pet. App. 29–46; 332 F. Supp. 1107). The court directed that a plan for the implementation of its order be submitted (Pet. App. 46; 332 F. Supp. at 1115–1116). Pursuant to the court's order, E. Wilson Purdy, the Director of Public Safety of Dade County, submitted a plan, adopted by the court with modifications on January 25, 1972 (Pet. App. 47–54; 336 F. Supp. 490), which provided for preliminary hearings within four days of initial appearance for those unable to post bond and within ten days for all other defendants (Pet. App. 49; 336 F. Supp. at 491). Petitioner Gerstein appealed to the Fifth Circuit Court of Appeals, and that court stayed the Purdy Plan pending appeal.

Shortly thereafter, the judges of Dade County implemented their own plan for preliminary hearings, under which the State Attorney retained the power, given him by Florida law, to bypass the preliminary hearing by filing an information. The court of appeals thereupon lifted its stay order and directed the district court to make specific findings of fact on the constitutional deficiencies, if any, of the plan implemented by the Dade County judges. Meanwhile, the Supreme Court of Florida amended its Rules of Criminal Procedure to provide, *inter alia,* for preliminary hearings. The amended rules, however, provide that preliminary hearings are available only to those charged with felonies and that persons proceeded against by information filed by the State Attorney are

not entitled to such hearings. Florida Rules of Criminal Procedure, Rule 3.131(a).[9]

On remand from the court of appeals, the district court concluded that the practice that permits the State Attorney to obviate the requirement of a preliminary hearing by filing an information does not afford due process of law and violates the Fourth Amendment; that providing different time limits for preliminary hearings for those charged with capital offenses and offenses punishable by life imprisonment from those set in other cases violates both due process and equal protection; and that the authorization for the State Attorney to refile an information if a defendant is discharged by a judicial officer is a violation of the Fourth and Fourteenth Amendments (Pet. App. 55–69; 355 F. Supp. 1286). The court also concluded that the denial of preliminary hearings to misdemeanants violates the Fourth Amendment and both the due process and equal protection clauses of the Fourteenth Amendment (Pet. App. 60–65; 355 F. Supp. at 1289–1291). Accordingly, it required a judicial probable cause determination for all misdemeanants who face potential imprisonment, but not those charged with violations that carry no possible prison term (Pet. App. 61–62; 355 F. Supp. at 1290).

On August 15, 1973, the court of appeals affirmed the judgment of the district court in substantial part (Pet. App. 1–28; 483 F. 2d 778). The court held that due process requires a preliminary hearing on prob-

[9] The Rule provides, in pertinent part: "A defendant, unless charged in an information or indictment, has the right to a preliminary hearing on any felony charge against him."

able cause before a judicial officer "when the state attorney prosecutes presently-confined arrestees by filing an information" (Pet. App. 10; 483 F. 2d at 783). It also concluded that "[n]o sufficient justification exists for disallowing preliminary hearings for misdemeanants" (Pet. App. 23; 483 F. 2d at 788). Finally, the court vacated that portion of the district court's judgment relating to two specific sanctions imposed,[10] because it would "not presume that such onerous sanctions" were any longer necessary to insure compliance with the amended Florida Rules of Criminal Procedure as modified by the court's opinion (Pet. App. 28; 483 F. 2d at 790).

This Court granted certiorari on December 3, 1973 (414 U.S. 1062); briefs were filed, and the Court heard argument on March 25, 1974. On April 15, 1974, the Court ordered that the case be restored to the calendar for reargument, and on May 28, 1974, the Court invited the United States and the Attorneys General of the fifty States to file briefs as *amici curiae*.

SUMMARY OF ARGUMENT

1. Our analysis begins with the contention that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial

[10] The sanctions were: (1) after a magistrate's finding of no probable cause, the prosecutor only could proceed by grand jury indictment; and (2) if no preliminary hearing were provided within the prescribed time limits, the charges would be withdrawn and the defendant released from custody. The charges could be refiled, but, if twice withdrawn, the prosecutor could only proceed by grand jury indictment. See Pet. App. 51, 53; 336 F. Supp. at 492–493; Pet. App. 27–28; 483 F. 2d at 790.

review of the charging decision by a judicial officer. While the court of appeals focused its concern not on the right of the prosecutor to file charges but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court (a preliminary hearing) undermines this traditional premise of our criminal justice system.

It is established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California*, 110 U.S. 516. Moreover, a prosecutor's information, if valid on its face, is enough to call for a trial of the case on the merits. See *Costello* v. *United States*, 350 U.S. 359, 363. Finally, this Court has consistently held that no preliminary hearing is required by the Constitution prior to the formal accusation by the prosecutor's information. *Lem Woon* v. *Oregon*, 229 U.S. 586; *Ocampo* v. *United States*, 234 U.S. 91; *Beck* v. *Washington*, 369 U.S. 541.

An underlying assumption and natural consequence of these decisions is that, if no hearing is required before the filing of the formal charge (either indictment or information), none can be required after the formal charge is brought, because, historically, the hearing was "preliminary" to the filing of such charges in a court of competent trial jurisdiction. Its limited purpose was to allow the magistrate to determine whether there was then sufficient evidence upon a complaint by a citizen or police official to "bind over" a suspect for later stages of the criminal process pending deter-

mination of whether to file the formal charge. No legitimate purpose is served by a preliminary hearing after the charge has been filed, because the information or indictment itself establishes that the evidence is sufficient to require the suspect to answer the charges against him at trial. See *Costello* v. *United States, supra; Albrecht* v. *United States,* 273 U.S. 1. Moreover, the Court's opinion in *Ocampo* not only supports the proposition that no preliminary hearing need precede the trial, but it also makes clear that the information filed by the prosecutor is sufficient to require the court to issue a warrant to bring the accused before it for trial. See also Fed. R. Crim. P. 9(a); *Albrecht* v. *United States, supra;* cf. *Ex parte United States,* 287 U.S. 241, 249–250.

Conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Both *Coolidge* v. *New Hampshire,* 403 U.S. 443, and *Shadwick* v. *City of Tampa,* 407 U.S. 345, were concerned with the kind of probable cause determination traditionally made by magistrates preliminary to the issuance of warrants. While there are historical and practical reasons for a magisterial determination of probable cause for a warrant in the investigative phase of a criminal case, assessment of the evidence for sufficiency to support the bringing of formal criminal charges traditionally has been a prosecutorial function (or a function of the prosecutor together with a grand jury, but never of the judiciary).

Nor does *Morrissey* v. *Brewer,* 408 U.S. 471, require a preliminary hearing in the situation

presented here. That case requires only that someone other than the parole officer who has recommended revocation make a preliminary evaluation that there is probable cause to believe that conditions of parole have been violated. In the criminal justice system, this type of preliminary evaluation properly is made by the prosecutor, who reviews the decision of the arresting officer before deciding to submit the case to the grand jury for its consideration or before filing an information. Moreover, in making the decision whether to prefer charges, the prosecutor has both the duty and the natural incentive to assess fairly the relevant factors—the strength of the evidence, the likelihood of conviction and the efficient utilization of limited prosecutorial resources. See ABA Standards for Criminal Justice, *The Prosecution Function,* §§ 3.4(a), 3.9(b) (Approved Draft, 1971).

Even if preliminary hearings are sometimes to be required in cases initiated by information, it is not unconstitutional to differentiate between felony and misdemeanor cases in this regard. *Argersinger* v. *Hamlin,* 407 U.S. 25, does not support a contrary conclusion. *Argersinger* was concerned with the requirements of the Sixth Amendment, which by its terms applies to "all criminal prosecutions." The due process right to a preliminary hearing, on the other hand, necessarily relates to the method by which charges are brought, and the Fifth Amendment itself distinguishes between felony and misdemeanor prosecutions in that regard. Moreover, in considering misdemeanor cases (four to five million annually in the state courts, ten thousand

in the federal courts and 6,500 in the Superior Court of the District of Columbia), it is particularly appropriate to balance the supposed benefit to the accused from a preliminary hearing against the strain on the criminal justice system that will be imposed by diverting overburdened judges, court personnel, lawyers and facilities from the task of speedily disposing of cases at trial. In the case of misdemeanors at least, the due process balance should be struck on the side of speedy trial rather than preliminary hearing.

2. Because the court of appeals' holding was expressly limited to "presently-confined arrestees" (Pet. App. 10; 483 F. 2d at 783), it is clear that the court's concern was with incarceration of defendants pending trial. That being so, the court selected a remedy (the preliminary hearing) which is functionally and historically inappropriate to meet the problem. To the extent that possibly unjustified pre-trial incarceration was its concern, the focus of the court's opinion should have been not on preliminary hearings but on the Florida bail procedures.

Due process is afforded, we submit, when relevant matters concerning the strength of the prosecutor's case can be considered in the course of the bail proceedings. In the federal system and in the Superior Court of the District of Columbia, "the nature and circumstances of the offense charged" and "the weight of the evidence against the accused" are factors considered by the judicial officer in determining appropriate conditions of release pending trial. 18 U.S.C. 3146(b); 23 D.C. Code 1321(b). Since these are the very factors that respondents would have the

judicial officer consider at a preliminary hearing, the bail hearing, though a less formal proceeding, is the functional equivalent of the hearing that respondents seek as a constitutional right. In a weak case, the consideration of these factors nearly always would lead to an accused's release on bond (but, of course, not to dismissal of the charges against him). In the rare case where there appears to be both a weak government case and a strong likelihood of flight before trial, the court, in the exercise of its discretion to control its calendar, may schedule the trial immediately or on an expedited basis. The power of the court in matters of bail and with respect to its calendar thus affords ample judicial control over the problem of potentially unjustified pre-trial incarceration to satisfy the requirements of due process.

3. Assuming *arguendo* that the bail system is not an adequate check on unwarranted detention of defendants pending trial and that some form of preliminary probable cause determination by a judicial officer is constitutionally required, it does not follow that due process requires adoption of a formal preliminary hearing as the vehicle for this determination.

The magistrate's assessment of probable cause is not inherently the kind of inquiry that requires live witnesses and cross-examination, as is evidenced by the fact that search and arrest warrants are authorized on the basis of *ex parte* applications supported by affidavits (which may be based in whole or in part on hearsay evidence). Due process would be satisfied by a similar procedure for the determination of probable cause after arrest and the filing of an information.

Any probable cause determination which is required could be fairly and efficiently made at the bail hearing, which is much ess formal than the preliminary hearing sought by respondents. The determination of probable cause, like bail and sentencing decisions, can be made on the basis of information proffered in open court by counsl (with the judge or magistrate retaining power, in the occasional case where he considers it necessary, to require live witnesses).

Recent due process cases of this Court relied upon by the court of appeals and by respondents [11] do not require a more fornalized procedure to determine probable cause. Those cases concerned with a requirement of notice and hearing before what is effectively a final judgment in the case (*Constantineau* and *Stanley*) are obviously inapplicable, because the filing of an information does not represent a final disposition of either the mater of pre-trial detention (considered in the bail proceeding) or the ultimate question of guilt or innocence (resolved at trial). Those cases involving the constitutional validity of temporary deprivations in advance of final judgment (*Sniadach, Goldberg, Bell* and *Fuentes*) were decided in wholly different contexts and involved individualized consideration of the kind of process that is due before a particular deprivation of property takes place. Due process does not always require that notice and opportunity for hearing precede

[11] *Fuentes* v. *Shevin*, 407U.S. 67; *Stanley* v. *Illinois*, 405 U.S. 645; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp.*, 395U.S. 337.

the taking of property or liberty; indeed, certain decisions may be made *ex parte* and by non-judicial or administrative officers. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73–157, decided May 15, 1974; *Michell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974. In the criminal justice system, while an arrest may be made without a warrant by a police officer, the prosecutor then carefully reviews the case brought by the police (cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra*) and determines whether there is evidence sufficient to file a formal charge. Moreover, the bail hearing provides the opportunity for an informal judicial examination of the case and for the restoration of at least conditional liberty pending a final determination of the case on its merits. No comparable procedure for review and protection of the interests at stake existed in any of the cases relied upon by the court of appeals and by respondents.

Finally, our analysis of the requirements of due process necessarily considers the costs to the criminal justice system of requiring preliminary hearings with live witnesses in every case. Such a requirement will divert already overburdened judges, prosecutors, defense lawyers, court personnel and court facilities from the task of speedily disposing of cases. Moreover, the very real problem of securing the cooperation of lay witnesses will be exacerbated by procedures requiring them to spend additional time waiting to testify and actually testifying in court; and law enforcement officers, called to court for such preliminary matters, will be taken away from the active prevention and investigation of crime.

ARGUMENT

In the first part of our argument (pp. 22–47, *infra*), we contend that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial review of the charging decision by a judicial officer. We will show that both historically and in terms of its present function, a preliminary hearing is inappropriate once formal criminal charges have been preferred by way of information. Moreover, conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Finally, we urge that any requirement for preliminary hearings that the Court may recognize, can constitutionally and should appropriately be confined to felony cases.

Our argument in Part II, *infra*, pp. 48–53, is premised on the fact that the court of appeals was concerned not about the right of the prosecutor to prefer charges by information, but about the fact of pre-trial incarceration without the opportunity for a judicial determination whether there is evidence sufficient to support the charge. We contend, however, that due process is afforded when relevant matters concerning the strength of the prosecution's case can be considered in the course of the bail proceedings. Pre-trial release (but not dismissal of the charges) may be appropriate in a weak case.

Assuming, *arguendo*, that the Court concludes that due process requires an independent probable cause

determination by a judicial officer before trial, we contend in Part III, *infra*, pp. 53–67, that other means than the preliminary hearing are permissible to satisfy that requirement. Due process can be afforded by an informal judicial procedure such as that provided by the bail hearing or in reviewing affidavits in support of warrants. Recent due process decisions of this Court do not require a more formal procedure in the nature of a preliminary hearing to determine probable cause. Finally, we suggest that the costs to the criminal justice system of requiring probable cause determination by formal preliminary hearing significantly outweigh the benefits which would accrue.

I

IN CRIMINAL CASES THAT MAY CONSTITUTIONALLY BE COMMENCED BY AN INFORMATION FILED BY THE PROSECUTOR, DUE PROCESS DOES NOT REQUIRE AN OPPORTUNITY FOR PRE-TRIAL REVIEW OF THE CHARGING DECISION BY A JUDICIAL OFFICER

We begin our analysis by showing that the Constitution does not require pre-trial judicial review of the sufficiency of the evidence to support a prosecutor's unilateral determination, solemnized in a formal information filed with the court, that an individual should be required to stand trial to answer criminal charges. While the court of appeals focused its concern not on the onus of trial, but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court to eliminate the risk of unjustified detention (a preliminary hearing) implicitly undermines, in our view, the traditional premise of our criminal justice system that the charg-

ing decision in certain categories of cases (limited to misdemeanors and petty offenses in the federal system) resides with the prosecutor and is not subject to pre-trial judicial review.[12] Having isolated and considered the respective roles of court and prosecutor in the charging decision, including the function of the preliminary hearing, the ground is then cleared to consider (as we do in Part II, *infra*) the problem of pre-trial custody and the nature of the remedies appropriate to minimize the risk of unjustified pre-trial detention.

A. HISTORICALLY AND IN TERMS OF ITS PRESENT FUNCTION, A PRELIMINARY HEARING IS INAPPROPRIATE ONCE FORMAL CRIMINAL CHARGES HAVE BEEN PREFERRED

It has long been established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California,* 110 U.S. 516.[13] More-

[12] Except, of course, that an information, like an indictment, is subject to pre-trial attack on grounds of facial invalidity or through the establishment of certain types of defenses—*e.g.*, statute of limitations, double jeopardy—not entailing an assessment of "probable cause." The availability of this kind of challenge to a criminal charge is not at issue here, nor is the question of the relief available for retaliatory or discriminatory prosecutions.

[13] See also *McNulty* v. *California*, 149 U.S. 645, 648; *Hodgson* v. *Vermont*, 168 U.S. 262, 272; *Bollen* v. *Nebraska*, 176 U.S. 83; *Maxwell* v. *Dow*, 176 U.S. 581; *Dowdell* v. *United States*, 221 U.S. 325, 332; *United States* v. *Pickard*, 207 F.2d 472 (C.A. 9); *Rivera* v. *Government of the Virgin Islands*, 375 F.2d 988 (C.A. 3); *United States* v. *Funk*, 412 F.2d 452, 454–455 (C.A. 8); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5).

over, under current federal practice, "[a]n information may be filed without leave of court." Fed. R. Crim. P. 7(a).[14] Equally accepted hitherto is the proposition that "an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States,* 350 U.S. 359, 363. See also *Lawn* v. *United States,* 355 U.S. 339, 349; *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 599. Finally, this Court has stated on numerous occasions that there is no constitutional requirement of a preliminary hearing prior to the initiation of formal criminal charges, whether by indictment (*Goldsby* v. *United States,* 160 U.S. 70, 73; *United States ex rel. Hughes* v. *Gault,* 271 U.S. 142, 149; *United States ex rel. Kassin* v. *Mulligan,* 295 U.S. 396, 400), or by information, where the prosecutor is authorized by law to proceed in that manner. *Lem Woon* v. *Oregon,* 229 U.S. 586; *Ocampo* v. *United States,* 234 U.S. 91; *Beck* v. *Washington,* 369 U.S. 541.[15]

[14] This was not always so. See *Albrecht* v. *United States*, 273 U.S. 1. Under the *Albrecht* decision, however, leave of court would be freely granted even though the information was not verified or accompanied by affidavits, for the oath of office of the United States Attorney was deemed "sufficient to give verity to the allegations of the information." *Albrecht* v. *United States*, *supra*, 273 U.S. at 6.

[15] Every circuit court of appeals that has considered the question of whether there is a constitutional right to a preliminary hearing, including the Fifth Circuit prior to this case, has concluded that there is no such right See *Sciortino* v. *Zampano*, 385 F.2d 132, 134 (C.A. 2), certiorari denied, 390 U.S. 906 (indictment); *Government of the Virgin Islands* v. *Bolones*, 427 F.2d 1135, 1136 (C.A. 3) (information); *Barber* v. *United States*, 142 F.2d 805, 807

Respondents argue, however, that while a preliminary hearing may not be required prior to the filing of the formal criminal charge, due process of law requires a determination of probable cause by a neutral and detached magistrate subsequent to the filing of an information. They do not urge that such a hearing is required when the prosecutor proceeds by grand jury indictment (Respondents' Brief, p. 2), although both this Court and Congress have concluded that the indictment and the information are entitled to equal dignity as charging documents (see, *e.g., Costello* v. *United States, supra*),[16] and that no preliminary

(C.A. 4), certiorari denied, 322 U.S. 741 (indictment); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5) (information); *United States* v. *Smith*, 343 F.2d 847, 850 (C.A. 6), certiorari denied, 382 U.S 824 (indictment); *United States* v. *Funk*, 412 F.2d 452, 455–456 (C.A. 8) (information); *United States* v. *Pickard*, 207 F.2d 472, 474 (C.A. 9) (information); *Pearce* v. *Cox*, 354 F.2d 884, 891 (C.A. 10), certiorari denied sub nom. *Charlton* v. *Cox*, 384 U.S. 976 (information); *Crump* v. *Anderson*, 352 F.2d 649, 651–652 (C.A.D.C.) (indictment and information); but see *Brown* v. *Fauntleroy*, 442 F.2d 838 (C.A.D.C.).

State courts that have considered the matter also have concluded that there is no constitutional right to a preliminary hearing. See, *e.g., Washington* v. *State*, 213 Ark. 218, 210 S.W. 2d 307; *State* v. *Mazzadra*, 28 Conn. Super. 252, 258 A. 2d 310; *Smith* v. *O'Brien*, 109 N.H. 317, 251 A. 2d 323; *State* v. *Singleton*, 253 La. 18, 215 So. 2d 838; *State* v. *Jackson*, 43 N.J. 148, 203 A. 2d 1; *Commonwealth* v. *O'Brien*, 181 Pa. Super. 382, 124 A. 2d 666; *State ex rel. Leighton* v. *Henderson*, 448 S.W. 2d 82 (Tenn. Crim. App.); *Benson* v. *Commonwealth*, 190 Va. 744, 58 S.E. 2d 312; *State* v. *Ollison*, 68 Wash. 2d 65, 411 P. 2d 419, certiorari denied *sub nom. Wallace* v. *Washington*, 385 U.S. 874; *Commonwealth* v. *Britt*, 285 N.E. 2d 780 (Mass.); *Shields* v. *State*, 126 Ga. App. 544, 191 S.E. 2d 448. See also *Freeman* v. *Smith*, 301 A. 2d 217 (D.C. App.).

[16] In *Ewing* v. *Mytinger & Casselberry*, *supra*, 339 U.S. at 599, it was said by way of example: "The impact of the initia-

examination is required "if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination." Fed. R. Crim. P. 5(c).[17] See also 18 U.S.C. 3060(e).

The rationale underlying the provisions in the Federal Magistrates Act and the Federal Rules that cut off the right to a preliminary hearing after the filing of the formal charge (indictment or information) is found in the history and purpose of the preliminary hearing.[18] In England, at a time when there was neither a police force nor a public prosecutor, the

tion of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. * * * The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law."

[17] While this provision was added to the Federal Rules of Criminal Procedure in 1972 in order to conform the Rules with the Federal Magistrates Act of 1968, 82 Stat. 1107, it is consistent with prior law. *See Crump* v. *Anderson*, 352 F.2d at 656 *supra*; *Barrett* v. *United States*, 270 F.2d 772 (C.A. 8).

[18] For an excellent discussion of the history of the preliminary examination, see Staff Memorandum, *Historical Analysis of the Preliminary Hearings*, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 3475 and S. 945 (Federal Magistrates Act), 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 268–271 (hereafter referred to as "Staff Memorandum"). See also Orfield, *Criminal Procedure from Arrest to Trial*, ch. 2, pp. 49–100 (1947); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 Mich. L. Rev. 1361, 1365–1370 (1969).

amicus brief

Supreme Court, U. S.
FILED
SEP 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

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BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal services and defender offices in the United States. Founded in 1911, it includes over 4,000 individual and professional members who have a major concern with safeguarding the rights of criminal defendants and, in particular, indigent criminal defendants.

The NLADA is disturbed at the often lengthy pre-trial detention of criminal defendants. The situation is even more disturbing where there has been no judicial determination concerning the basis for the criminal accusation which has resulted in the incarceration. Pretrial detention even without a judicial determination of the basis for the accusation is obviously more likely for the indigent, who is unable to post bond, than for the rich. Because we believe incarceration without a judicial imprimatur violates the constitutional rights of indigent defendants, we file this brief in support of respondents.

NLADA files this Amicus Curiae Brief pursuant to Supreme Court Rule 42(2). The written consent of counsel for all parties has been secured.

STATEMENT OF THE CASE

Amicus Curiae adopts respondents' Statement of the Case.

STATEMENT OF THE FACTS

Amicus Curiae adopts respondents' Statement of the Facts.

ISSUE PRESENTED

Whether the due process clause and the constitutional prohibition against unreasonable seizures of the person prohibit the pretrial incarceration of accused persons without a judicial determination of probable cause for their arrest.

ARGUMENT

THE INCARCERATION OF RESPONDENTS WITHOUT ANY JUDICIAL DETERMINATION OF PROBABLE CAUSE AFTER A HEARING VIOLATES THEIR RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

In view of the arguments set forth by petitioner, it is important to note initially what the issues are and what they are not. Respondents, representing a class of pretrial detainees, contest the right of the State to hold them in detention without having provided a hearing before a neutral magistrate to determine whether there is probable cause for the detention. Respondents do not contest the adequacy of the information filed by the State's Attorney as a jurisdictional basis for the continuation of the prosecution against them. Thus, most of the cases relied upon by petitioner are inapposite, since they deal with nothing more than the sufficiency of a legal process as the basis for a criminal proceeding.

In *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111 (1884), the only issue raised was whether a defendant could be prosecuted based on an information rather than an indictment. This Court held that the indictment requirement of the Fifth Amendment did not apply to the States. Not only was the issue totally irrelevant to what is argued here, but it is significant to note that under the law of California, an information could be filed only after examination and commitment by a magistrate, which examination consisted of the giving of testimony under oath by witnesses. *Id.* at 517-518, 4 S.Ct. at 112.

In *Albrecht* v. *United States*, 273 U.S. 1, 47 S.Ct. 250 (1927), the defendants had claimed that "because of defects in the information and affidavits attached, *there was no jurisdiction in the District Court . . .*" *Id.* at 4, 47 S.Ct. at 251. (emphasis added). This Court merely held that an illegal arrest did not deprive a court of jurisdiction. *Id.* at 8, 47 S.Ct. at 252. What this Court did not decide, and was not called upon to decide, was whether incarceration while the proceedings were going on would be illegal. *Id.* at 10, 47 S.Ct. at 253.

In *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 407 (1956), the issue for decision was whether a defendant could be required to stand trial where an indictment was based upon incompetent evidence. It was held that

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by a prosecutor, if valid on its face, *is enough to call for trial of the charge on the merits.*" *Id.* at 363, 76 S.Ct. at 409 (footnote omitted) (emphasis added).

Thus, *Costello's* application to the prosecutor's information situation goes no further than to permit trial on such an information. It certainly does not permit incarceration based on nothing more than a prosecutor's charge.

The holding of *Lawn* v. *United States*, 355 U.S. 339, 78 S.Ct. 311 (1959), is similarly limited to the sufficiency of a process to require a defendant to stand trial.

> ". . . one indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, *is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.*" *Id.* at 349, 78 S.Ct. at 317 (emphasis added).

As stated above, the question in this case is not whether a criminal prosecution may be based upon a prosecutor's information. The real question is whether such an information without a judicial determination of probable cause can justify the incarceration of respondents. The answer to that question must be in the negative.

The Fourteenth Amendment to the federal constitution prohibits any State from depriving any person of liberty without due process of law. This Court has held, with respect to other deprivations, that due process minimally requires a full hearing, substantially contemporaneous with the taking,* at which there is an opportunity to be heard before an independent and neutral decisionmaker. See, *e.g.*, *Mitchell* v. *W.T. Grant*, ... U.S. ....., 94 S.Ct. 1895, 1901, 1902 (1974) (property); *Fuentes* v. *Shevin*, 407 U.S. 67, 81, 82, 83, 92 S.Ct. 1983, 1994, 1995, 1996 (1972) (property); *Stanley* v. *Illinois*, 405 U.S. 645, 647, 649, 92 S.Ct. 1208, 1211 (1972) (custody of children); *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971) (driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971) (right to purchase liquor); *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268, 271, 90 S.Ct. 1011, 1020, 1022 (1970) (public assistance); *Sniadach* v. *Family Finance*

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* Some situations require that the hearing be held prior to the taking, *e.g.*, *Goldberg* v. *Ke'ly*, 397 U.S. 254, 266, 90 S.Ct. 1011, 1019 (1970), *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 341-342, 89 S.Ct. 1820, 1822 (1969), some that the hearing be held shortly after the taking, *e.g.*, *Mitchell* v. *W. T. Grant*, ... U.S. ...., ..., 94 S.Ct. 1895, 1901, 1902 (1974), depending on the nature of the competing interests. Amicus Curiae agrees with respondents that because of the nature of the criminal process it would not be feasible for the hearing to be required prior to arrest. A hearing held promptly after arrest would satisfy the requirements of due process while at the same time accomodating the governmental interest in the speedy apprehension of suspects.

Corporation, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (1969) (garnishment of wages).

More directly relevant, this Court has been equally solicitous with respect to the due process rights of persons whose right to conditional liberty is at issue. See, *e.g., Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972) (parolees); *Gagnon* v. *Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756 (1973) (probationers). Prior to final adjudication of their right to remain at liberty, parolees and probationers are entitled to a prompt preliminary hearing, before an independent decisionmaker, with a right to be heard on the question of whether there is probable cause. *Morrissey* v. *Brewer, id.* at 485-487, 92 S.Ct. at 2602-2603. Thus, the right to a preliminary hearing is not negated by the existence of procedures at a later time for a final determination of rights. See, also, *Fuentes* v. *Shevin, id.* at 81-82, 92 S.Ct. at 1995, 1996; *Bell* v. *Burson, id.* at 540, 91 S.Ct. at 1590.

With respect to the identity of the independent decisionmaker, and the standard to be applied by him, the Fourth Amendment is instructive. That provision protects the "right of the people to be secure in their persons . . . against unreasonable . . . seizures . . ." and regulates the making of arrests. An arrest must be based upon probable cause to believe that a crime has been committed and the person arrested has committed it. *Wong Sun* v. *United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963). This, then, is the standard against which the legality of a person's incarceration to answer to criminal charges must be measured.

Further, the Fourth Amendment requires that the independent decisionmaker be a "neutral and detached" magistrate, *Shadwick* v. *City of Tampa,* 407 U.S. 345, 348, 92 S.Ct. 2119, 2122 (1972). The State's Attorney is certainly neither an "independent decisionmaker" as required by due process* nor a neutral and detached magistrate as required by the Fourth Amendment. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 453, 91 S.Ct. 2022, 2031 (1970). See also *Shadwick* v. *City of Tampa, supra.*

The procedure followed by the State of Florida permits a prosecuting official in an *ex parte* proceeding to deprive respondents of their liberty by the filing of an information. This process provides neither the full hearing before an independent decisionmaker with opportunity to be heard required by the due process clause nor the neutral magistrate determining probable cause required by the Fourth Amendment. It therefore violates respondents' constitutional rights.

In *Ocampo* v. *United States,* 234 U.S. 91, 34 S.Ct. 712 (1912), the defendants did contest the use of a prosecutor's information as the basis for arrest as well as the basis for prosecution. However, that case did not resolve the question at issue here and contains several factors which make it substantially distinguishable from the case at bar.

The information in *Ocampo* included a sworn assertion by the prosecuting official that he had made a preliminary investigation, which included the examination of witnesses under oath, a procedure required by statute. *Id.* at 92-93, 34 S.Ct. at 712-713. Here of course there is no such statu-

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* In *Morrissey* v. *Brewer,* 408 U.S. 471, 486, 92 S.Ct. 2593, 2603 (1972), this Court explicitly excluded as an independent decisionmaker one who "has made the report of parole violation or has recommended revocation". Surely the prosecutor who has determined upon prosecution is in the same posture.

tory requirement. Petitioner has asserted in its brief that it is its "policy and practice" to conduct an independent examination. On oral argument, petitioner claimed that with respect to the individual respondents (although not with respect to the class), witnesses had been examined. Obviously, however, the safeguarding of constitutional rights cannot be made to depend upon "policy and practice" or the possibility that in a particular case a particular procedure will be followed.*

Second, *Ocampo* was decided before this Court held that the Fourth Amendment applied to the States. Thus, its holding that a prosecuting official may perform the "quasi-judicial" function of determining probable cause, *id.* at 98, 34 S.Ct. at 715, did not establish what was permissible under Fourth Amendment standards and has been overruled *sub silentio* by *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 453, 91 S.Ct. at 2031.

Third, the defendants in *Ocampo* had in fact posted bond, *id.* at 101, 34 S.Ct. at 716, and therefore the question of the legality of their continued incarceration was academic. This Court decided no more than that an initial arrest may be based on a prosecutor's information which itself is based on the examination of witnesses under oath. *Id.* at 100-101, 34 S.Ct. As argued above, however, due process requires much more to justify a continued incarceration, and the *Ocampo* decision is not controlling.

The interest of respondents in remaining free until a judicial officer or body has determined that they should be incarcerated is obviously at least as substantial as the in-

* In any case, the issues should be determined on the record established in the lower courts. *Morrissey* v. *Brewer, supra,* 408 U.S. at 476-477, 92 S.Ct. at 2598.

terest in public assistance, the purchase of liquor, a driver's license or conditional liberty. The accused is presumed innocent, and his liberty should not be taken without good cause. An accusation, even where brought by a prosecuting official, does not necessarily result in conviction.* Yet the deprivations resulting from loss of liberty can never be made good.

In addition, the defendant who remains incarcerated during the criminal proceedings is at a substantial disadvantage with respect to his ability to make a defense. His opportunity to consult with counsel is limited; his ability to assist in his defense by aiding in the investigation of his case is non-existent. It is well-known that because of crowded calendars and the substantial backing of criminal cases in most jurisdictions, the pre-trial detention period may extend for many, many months.

These hardships, which necessarily fall with greater impact upon the indigent or relatively indigent defendant who by definition is less able to obtain his liberty by posting bond, should not occur because of some assumption that the prosecutor will in good faith initiate only prosecutions which are well-founded. The prosecutor necessarily has an interest in obtaining criminal convictions, and he may well, whether from overzealousness or carelessness, institute proceedings as to which there is no probable cause. Even should a sufficient basis for prosecution and conviction ultimately develop, there has still been a deprivation of a substantial right which can never be cured. And, as indicated above, the mere fact of incarceration may well make it more likely that a prosecution will be

* In any event, the right to contest a preliminary detention at the time in no way hinges upon ultimate vindication. See *Fuentes* v. *Shevin,* 407 U.S. 67, 87, 92 S.Ct. 1983, 1997-1998 (1972).

successful, thus creating what is tantamount to a self-fulfilling prophecy. R. Kasanof and E. Single, "The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City", 8 Crim. L. Bull. 459 (1972); Wise, "Bail Reform in American Cities", 9 Crim. L. Bull. 770, 785-6 (1973).

This is not to say that every arrested defendant has an absolute right to liberty until and if he is convicted. But it is to say that the deprivation of liberty should not continue unless a neutral magistrate, after a full hearing, has determined that there is probable cause to hold him.

We ask this Court to accord to arrested defendants the same rights which it has granted to parolees, probationers, possessors of property and beneficiaries of public assistance—the right to a prompt and full hearing before a neutral and detached magistrate before he is deprived of his freedom.

CONCLUSION

For the above reasons, Amicus Curiae, the National Legal Aid and Defender Association, respectfully urges that the judgment of the lower court be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
OCT 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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APPENDIX 1a

IN THE

Supreme Court of the United States

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RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

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Respondents.

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENTS

INTRODUCTORY STATEMENT

On October 5, 1974 the Solicitor General filed an *amicus curiae* brief in this case. The Government's position, as stated in that brief, is that if any process is due to persons held in physical custody prior to trial

upon an information, the obligation is met by prosecutorial screening, bail hearings and expedited trials.

This, the third brief filed by the Respondents, focuses upon the Government's contentions. Our previous efforts have illustrated that a host of recent decisions compel the conclusion that the Respondents' claim to an opportunity to be heard after arrest but prior to trial is strong. Indeed, a comparison of the interests involved in this claim and those involved in *Mitchell v. W.T. Grant Company*, ____ U.S. ____, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); *Morrissey v. Brewer*, 408 U.S. 471 (1972); and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) compel the inescapable conclusion that persons held in jail solely upon a prosecutor's information have the strongest claim to a hearing. The Appendix to this Brief contains a chart which makes the comparison leading to that conclusion.

Faced with the recent due process decisions, the Government contends that they do not require a "formal procedure" to determine probable cause. Thus they present their prosecutorial screening, bail hearing, expedited trial trilogy as sufficient to meet due process standards. In doing so, the Government has overlooked the essential meaning of due process.

At the least due process, even in a preliminary inquiry, requires notice, an opportunity to confront and cross-examine adverse witnesses and the right to be heard by a neutral and detached person. *Morrissey v. Brewer*, 408 U.S. at 488-489. Against the most

minimum application of that standard, the Government's suggestions must be rejected.

In part one of this Brief we will demonstrate the deficiency in the Government's tripartite "hearing" procedure. Thereafter we will show that no rationale exists for denying an opportunity to be heard to misdemeanant defendants who are in jail awaiting trial. And finally, we will show that neither history nor the prior decisions of this Court justify the use of an unreviewed information to take a presumably innocent person's liberty without an opportunity to be heard.

I.

PROSECUTORIAL SCREENING, BAIL HEARINGS AND EXPEDITED TRIALS DO NOT, EITHER SINGLY OR IN SUM, MEET THE REQUIREMENTS OF THE RIGHT TO BE HEARD BY A NEUTRAL AND DETACHED PERSON COMMANDED BY THE DUE PROCESS CLAUSE.

A. Prosecutorial Screening Denies an Opportunity to be Heard.

The Respondents have consistently pointed out that an affirmance in this case would not diminish the prosecutor's role as the primary screening force in the decision to charge process. Respondents' Supplemental Brief 22-23. It would merely require a subsequent judicial review of the decision in a proceeding meeting due process requirements.

The reason for judicial oversight is simple. The prosecutor reviews the case brought by a complaining party, generally the police. He arrives at his conclusion based upon what the police present him. His ability to carefully determine probable cause is limited by the kind of information he receives. Even if a prosecutor is, as the Government asserts, naturally disinclined to prefer weak charges,[1] he has no real opportunity to test or verify the facts in the *ex parte* setting of his inquiry. Thus the best intentioned prosecutor may, because of the nature and manner of the information presented to him, find himself committed to an ill-founded prosecution.[2]

[1]While we do not question the general good faith of prosecutors, one cannot fail to recognize that factors other than wanting to win a case go into the decision to charge. Lewis R. Katz in *Justice is the Crime, Pretrial Delay in Felony Cases*, (1972), commenting upon the delicate balance in police-prosecutor relationships wrote:

> "Since both [offices] are working towards the same general goals, each is dependent upon the other's labors to facilitate its own work. As a result, prosecutors are fully aware that they cannot often refuse a police request to prosecute, and the police are aware that they cannot pressure for prosecution in too many questionable cases, for it is the prosecutor who ultimately must justify that decision in court."

Popularly elected prosecutors, like the Petitioner, also face political considerations which may affect their independence. These are also relevant factors in determining neutrality and detachment. See Point "B", *infra*.

[2]The record in this case is illustrative of that point. An assistant state attorney prepares an information after a complaining party or police officer comes into his office and talks to him. The information is reviewed by the Chief of the Complaint Division and forwarded to the State Attorney or one of his designated assistants for signature. App. 49-50. The Petitioner's Caseload Report for the Year Ended December 31, 1970 reflects that of the 7856 "disposed" felony and misdemeanor cases there were 1373 acquittals and 194 nol prosses. App. 62. If one excludes the 1373 categorized as "Other (Absentee Docket, etc.)" which were really not resolved, App. 62, approximately 16% of the prosecutions failed. These statistics do not reflect the number of cases in which an information "overcharged" a defendant. Since bond is set on the charge contained in an information, overcharges often result in unfair deprivations of pre-trial liberty which could be avoided by a preliminary hearing.

An opportunity to be heard subsequent to arrest would ameliorate the problems which always flow from ex-parte decisions. Justice Frankfurter stated:

> "... fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it is reached. Secrecy is not congenial to truth seeking and self righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it...."
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (concurring opinion).

Prosecutorial screening cannot provide that opportunity. A subsequent judicial hearing can. Judicial review serves as a check and balance upon police-prosecutor initiation of charges. That concept is recognized by commentators, Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 433 (1960) and by this Court:

> "... A democratic society, in which respect for the dignity of all men is central, naturally guards

> against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the over-zealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. . . ."
>
> *McNabb v. United States*, 318 U.S. 332, 343-344 (1943).

In response the Government argues that the screening process is so efficient that providing preliminary hearings would generally be a waste of time. Government Brief 41. They cite data showing high federal conviction rates and low state preliminary hearing dismissal rates to buttress their contention. Government Brief 41, n. 35; 67. However, their argument fails as a matter of law. Added to that, their statistics are suspect[3] and atypical.[4]

[3]Reliance upon the 97% conviction rate alluded to in *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) is inappropriate. That figure reflects felony prosecutions which must be commenced by indictment. Misdemeanor information cases in the federal system are, for the most part, unique to the District of Columbia. Government Brief 3-4. The 93% misdemeanor conviction rate in the District of Columbia excludes the 14% of charged persons whose cases are dismissed after completion of pre-trial diversionary programs. Some concern has been voiced that those programs encourage innocent people to waive their right to be heard. Goldberg, "Pre-trial Diversion: Bilk or Bargain?", 31 *NLADA Briefcase* 490, 499 (1973) And there is also reason to believe that persons incarcerated prior to trial are more likely to be convicted than those who were released. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). See also Amicus Curiae Brief of The National Legal Aid and Defender Association 9-10. Consequently a denied preliminary hearing, insofar as it might have foreclosed pre-trial release from physical custody by making a bail hearing meaningful (see discussion *infra*), may contribute to the high conviction rate.

Seeking to deny preliminary hearings because few persons obtain dismissal then or at trial is but one step from the argument that we ought to consider foregoing trials because few are acquitted. That kind of logic has been rejected long ago:

> "To one who protests against the taking of his property without due process of law, it is no answer that in his particular case due process of law would have led to the same result because he

[4]The F.B.I.'s *Uniform Crime Reports for the United States*, 1973, show that of those charged with violent crimes, 32% were acquitted or had their charges dismissed; 12.7% were found guilty of lesser offenses and 3.2% were found guilty of the offense charged. Of those charged with property crimes, 14.9% were acquitted or had their charges dismissed; 5.0% were found guilty of lesser offenses and 34.8% were found guilty of the offense charged. Miscellaneous offenses ranging from "other assaults" to drunkenness and disorderly conduct reflect acquittal rates from 44.1% to 9.4%. The highest conviction rate in the lesser crime category was in drunkenness cases (88.2%). The single largest group other than drunkenness was a category called "All other offenses". Only 51.4% of those people were found guilty of the offense charged. *Id.* Table 18, p. 116.

The Government also errs in attempting to measure the usefulness of preliminary hearings only by the number of dismissed cases. First there is evidence that large numbers of cases are dismissed at preliminary hearings. Respondents' Brief 34.-35. Second, the benefits which flow from such an adversarial hearing extend beyond dismissal to informed decisions on bail, psychiatric treatment, and reduction of charges. *Coleman v. Alabama*, 399 U.S. 1 (1970).

had no adequate defense upon the merits. . . ."

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

Due process guarantees not only the right to be heard, but the right to be heard by a neutral and detached person. The prosecutorial screening process fails to meet that test too.

B. The Prosecutor is Not Neutral and Detached.

The concept of "neutrality and detachment" is found in the Fourth Amendment and in the Due Process Clause. Compare *Shadwick v. City of Tampa*, 407 U.S. 345 (1970) with *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

The Government seeks to avoid the implication of the Fourth Amendment cases, *Shadwick* and *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), by saying that a prosecutor issuing an information is not an investigative officer and thus does not fall within Fourth Amendment proscriptions. Government Brief 38. Yet, a few pages later, they say preliminary hearings are valueless because "both prosecutors and defense counsel have had too little time to investigate their case. . . ." Government Brief 44, n. 39. That statement recognizes the duality of the prosecutor's role.[5] Once he has decided to file an information based upon the

[5]It also recognizes the shortcoming of the screening process. One would hope that a prosecutor would have investigated a case prior to filing. But the *ex parte* charging process precludes that protection.

police report he then becomes inextricably entwined with the investigative function necessary to build the case. Since we are not asking for a hearing *prior* to the filing of an information it is of little consequence that he has generally been uninvolved up to the time the police officer presents himself.[6] But once the information is filed, a function which we would not deny a prosecutor, it cannot be said that the continued loss of liberty which results solely from his signature is being accomplished by a neutral and detached party.

In *Shadwick* a unanimous Court wrote:

> "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality or affiliation of these [municipal court] clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires."
>
> *Shadwick v. City of Tampa*, 407 U.S. at 350.

Clearly, prosecuting officials cannot make the same claim to neutrality and detachment.[7]

[6]There are many instances when the prosecutor's office initiates and supervises an investigation. When he has accumulated evidence which he believes establishes probable cause, he files an information. The Government takes no cognizance of this multi-purpose role of a prosecutor which completely negates their characterization of the prosecutor as an accusative officer and not an investigative officer.

[7]The due process standard requires an "independent" decision maker. *Morrissey v. Brewer*, 408 U.S. at 486. The Fourth Amendment cases are instructive for they define neutrality and detachment and in the context of this claim provide an insight into "independent". For the reasons that a state attorney runs afoul of the Fourth Amendment standard, he cannot be "independent" under the Due Process Clause.

Even if one could say that a prosecutor were neutral and detached in Fourth Amendment or due process terms, the heart of the Respondents' case would be unaffected. For our claim is not that the initial taking is invalid, (Respondents' Brief 13; Tr. of Oral Arg. 54-55), but merely that the taking without a later opportunity to be heard is invalid. This is a Fourteenth Amendment Due Process claim. Since we have already shown that prosecutorial screening affords no opportunity to be heard, whether a prosecutor is neutral and detached is important only insofar as it underscores the total lack of protection afforded to a person incarcerated upon an information.[8] We submit that the prosecutor's function makes it inappropriate for him to claim that he is so impartial that a judge may not inquire into his determination of probable cause.

C. Bail Hearings Do Not Provide the Opportunity to Be Heard On the Question of Probable Cause and Even if Release from Custody were the Issue in This Case, Such Hearings are Irrelevant to Those Charged with Non-Bailable Offenses and the the Indigent.

This case does not present the question of whether the Respondents are entitled to be at liberty upon bail.

[8] An additional consideration is found in the Fifth Circuit's view that "even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system" compromises any argument that a state attorney is sufficiently neutral, detached or independent to be the sole arbiter of probable cause. *Pugh v. Rainwater*, 483 F. 2d at 778.

The Government's effort to transform the issue into one of bail misses the point of this litigation. It poses the issue of whether defendants charged upon informations have a right to be heard prior to trial. The fact of physical custody is important only because in balancing due process claims, one consideration is the quality of the deprivation. Here it is the total taking of absolute liberty. If the Respondents had been released upon bond they would not have been foreclosed from claiming a denial of the right to be heard. A different consideration would merely be present when a court balanced the competing interests in assessing the due process claim.

For Pugh and the class he represents, bail hearings are a totally irrelevant proposal. Pugh was charged with robbery, a "life" offense which requires that bail be denied unless *he* showed that the proof of guilt was not evident nor the presumption that he committed the crime great. *Loper v. Stack*, 291 So. 2d 207, (4th D.C.A. 1974). The information not only denies a preliminary hearing, it denies bail.

Against that background we consider the utility of the bail hearings suggested by the Government to see if they can ever provide the rights asserted by the Respondents.

In the Florida system bail hearings do not provide for an opportunity to test probable cause. *Pugh v. Rainwater*, 483 F.2d at 781, n. 8. Of course, the filing of an information would preclude such an inquiry. *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972). An information filed against a misdemeanant in the federal system would likewise preclude a probable

cause inquiry. Rule 5(c), Federal Rules of Criminal Procedure.

While the "weight of the evidence against the accused" (18 U.S.C. Sec. 3146(b)) is a federal consideration in setting bail, it is a far cry from being what the Government calls the "functional equivalent of the (preliminary) hearing". Government Brief 52. The difference is a matter of form and substance.

The bail hearing provides no opportunity to confront, cross-examine or present evidence on the question of probable cause. At best it is an informal inquiry into the case and the prosecutor's view of the strength of it. The defect in the decision to charge process infects the prosecutor's response and destroys the contention that the bail hearing provides a safeguard against improvident prosecutions. The prosecutor's view of his case is one-sided. He conveys that to the court either orally or by the affidavit procedure the Government suggests. There is no opportunity to effectively confront that kind of presentation. The bail hearing merely perpetuates the denial of the opportunity to be heard.

That ongoing failure makes the decision on bail itself suspect. Providing the opportunity to be heard on the question of probable cause would improve fairness in bail decisions. This Court has recognized the usefulness of preliminary hearings in setting bail. *Coleman v. Alabama*, 399 U.S. 1 (1970). Given the long lament of legal scholars over the bail system,[9] one wonders if the

[9]See Goldfarb, *Ransom* (1965); Kasanof and Single, "The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City", 8 Crim. L. Bull. 459 (1972); A Program for Prison Reform in the United States, Final Report of the Annual

Government should not be arguing for preliminary hearings in order to make bail decisions more informed for the sake of society as well as defendants.

Any doubt about the Government's attempt to circumvent the right to be heard via bail hearings is resolved by considering the available recent statistical data on the utility of bail. In mid-year 1972, the total local jail population in the United States was approximately 141,600 persons. Of that number, 50,800 were awaiting trial. Thirty thousand five hundred were in other stages of adjudication, including some who were arrested but not yet arraigned. Of the awaiting trial group, approximately 5,700 were charged with minor offenses including traffic, drunkenness, petit larceny and simple assault. The average delay for those awaiting trial was three months. Nearly 50% of the total number of persons incarcerated were held in the jails of six states: Florida, California, Texas, New York and Pennsylvania.[10]

Chief Justice Earl Warren Conference on Advocacy" (1972). Recommendation XI of that report included these views:

> "The presumption of innocence should pervade our system of criminal justice at all pre-conviction stages. But our present bail and release on recognizance systems do violence to that principle and are discriminatory and arbitrary . . . (U)nder our present practices half or more of accused persons are detained in jail pending trial."

[10]See: *Survey of Inmates of Local Jails; Advance Report.* United States Department of Justice, National Law Enforcement Assistance Administration, National Criminal Justice and Statistic Service, Table B. p. 17, and text pp. 5-6 (1974). An earlier report, the *1970 National Jail Census*, United States Department of Justice, National Law Enforcement Assistance Administration, National Criminal Justice Statistic Service at pp. 3 and 10 (Table 2) (1971), reflected that Florida was one of the six states which held over half of all the pre-trial detainees.

According to the Government, 15 to 20% of those charged with misdemeanors in the District of Columbia are unable to make bail pending trial. Government Brief 4. They remain incarcerated for substantial time periods. Government Brief 47-48 n. 41.[11]

Neither federal nor state bail hearings provide the chance to be heard on the issue of probable cause. That denial, to one who is presumed innocent and deprived of his absolute right to liberty, makes the hearing meaningless in the due process context posited by this case. The hearing is certainly devoid of value to people who, like the Respondents, are either not entitled to bond or cannot afford the bail set. App. 6, 10, 31. Thousands of people in the state and federal systems share those problems. The bail system has been of limited use in securing the right to release pending trial. It is useless in securing the right to be heard on probable cause. *State ex rel. Hardy v. Blount, supra;* Rule 5(c), Federal Rules of Criminal Procedure.

D. Expedited Trials and Calendar Control are Not a Valid Response to the Denial of an Opportunity to Be Heard Prior to Trial.

The expedited trial part of the trilogy proposed by the Government is the relief to be afforded if all else

[11]One of the Government's statistics is of limited value. It shows that 60.8% of the cases are disposed of betweenn zero and 45 days. But we have no way of knowing how many in that group are tried near the end of the 45-day period. What is clear is that over 14% are not tried within 90 days. Government Brief 48.

fails. But it comes too late. What difference does it make if a defendant is tried in 30, 60 or 90 days if he should not be tried at all? The probable cause hearing focuses upon the issue of whether trial is appropriate. The expedited trial does not address that consideration, which for a person presumed to be innocent, is an important one.

Moreover, there is evidence supporting the proposition that preliminary hearings will encourage speedy trials. The record in this case, reflecting a 20-25% decrease in the felony court caseload, shows that preliminary hearings, by dismissing cases, reducing charges and accepting pleas, aids in attaining that goal.

The length of pre-trial incarceration for jailed misdemeanants in the District of Columbia is already long without preliminary hearings. The Government can only speculate on the impact that preliminary hearings would have. The Solicitor General's pessimism may be unfounded. In any event, the Government forgets that an escape valve exists if they find preliminary hearings intolerable. They may indict instead of using an information. Indeed, the alarm sounded by the Government is even too shrill for the state system. They too may indict.[12] Whether such a response would run afoul of due process arguments similar to those made here is a question for another day. (See Tr. of Oral Arg. 60.)

The point is that preliminary hearings may expedite, not retard, criminal proceedings. But no matter the

[12]The option of indictment also provides an alternative for those who fear that the cost of providing due process is too great. That is discussed *infra*.

effect, rushing to trial is no response to this due process claim. The Government plan would pose a grisly Hobson's choice for incarcerated defendants: give up your preliminary right to be heard or face immediate trial even if you are not ready. That may not even be fair to the Government if they have not completed their investigation.

What is apparent throughout the Government's Brief is concern for the cost of providing preliminary hearings. The expedited trial suggestion is part of that concern and so we turn to that consideration.

E. Considerations of Cost and Efficiency Do Not Bar the Respondents' Claim.

Problems of cost and efficiency are not new responses to constitutional claims. This Court has answered by saying:

> "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell v. Burson, supra,* at 540-541; *Goldberg v. Kelly, supra,* at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois, 405 U.S. 645, 656."
>
> *Fuentes v. Shevin,* 407 U.S. at 90 n. 22. See also *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969).

Those thoughts are especially appropriate to the taking of liberty involved here.

It costs are to be measured at all, they may be offset by the positive attributes of preliminary hearings. Reduced jail populations resulted from the initial *Pugh* decision and the implementation of a local preliminary hearing plan. *Pugh v. Rainwater,* 355 F. Supp. at 1291; App. 109. Added to those savings are the cost of human misery which may be alleviated by a preliminary hearing. Consider the description of one relatively recent inmate of the District of Columbia jail:

> "The first night we were very impressed with the D.C. jail. It was always around 100 degrees and you dripped sweat. At nine or ten o'clock they put the lights out, and for a whole hour persons just screamed at each other and the guards and everything else. It's like something out of Dante – screams, cursing and so forth. I asked one of the old-timers and he said it is like this every night – just letting off steam like the hour of frustration."
>
> *Harper's Magazine,* October 1974, pp. 56-57.

Since most jailed federal misdemeanant defendants reside in the District of Columbia jail, it is appropriate

to turn to the Government's request that any requirement for preliminary hearings be confined to felony cases.

II.

INCARCERATED PERSONS CHARGED WITH MISDEMEANORS BY A PROSECUTOR'S INFORMATION ARE ENTITLED TO A PRELIMINARY HEARING.

A person held for trial upon a misdemeanor charge is deprived of his liberty as surely as a felony defendant. The jail cell looks the same to each. While the Constitution may call for different methods of initiating felony and misdemeanor prosecutions, the Due Process Clause draws no bright lines around one kind of lost liberty. It is disingenuous to suggest that a misdemeanant's pre-trial liberty is less valuable than a felony defendant's. The Court has recognized the harm which flows from any incarceration. *Baldwin v. New York*, 399 U.S. 66, 73 (1970); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

The same principles which require a hearing for jailed felony defendants apply to jailed federal misdemeanor defendants. Since misdemeanor trials do not occur quickly in the District of Columbia, the National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, Commentary to Standard 4.3 (1973) is no defense.[13]

[13]The Commentary views the preliminary hearing's protection against an unjustified trial unnecessary if a quick trial occurs in misdemeanor cases. Dade County, Florida, is attempting to meet that goal. Brief for Respondents, 25, n. 15. The Federal system apparently cannot. Government Brief 47-48, n. 41.

The vast bulk of misdemeanor prosecutions do not involve pre-trial or post-trial incarceration. The Government's fear that 15-20% of the four to five million misdemeanor prosecutions in the country would require preliminary hearings, Government Brief 46, n. 40, is unfounded. The statistics regarding the number of people in local jails awaiting trial, *supra*, should allay that trepidation.[14] See also Brief for Respondents 26, n. 16.

The request to exclude jailed federal misdemeanor defendants from preliminary hearing requirements should be rejected. It is constitutionally incongruous to prohibit one day of incarceration after trial unless a lawyer is provided or properly waived (*Argersinger*), but on the other hand condone lengthy pre-trial incarceration without a hearing.

III.

NEITHER THE PRIOR DECISIONS OF THIS COURT NOR HISTORY JUSTIFY THE DENIAL OF A PRELIMINARY HEARING TO PERSONS INCARCERATED UPON INFORMATIONS.

A. The Prior Decisions.

The Respondents have always begun their arguments by analogizing this case to the recent decisions which

[14]The figures showing the number of people who do not benefit from bail hearings in any way do not reflect the number of preliminary hearings which might be required under the facts of this case. Many of those awaiting trial were indicted, a process not under scrutiny here. The fact that only nine states filed amicus curiae briefs, and only one of those, Washington, shares the Florida process, attests to the limited impact an affirmance will have on the criminal justice system. In the federal system some 1300 cases would be affected. Government Brief 4.

involved similar, but less important, deprivations of liberty or property. The Petitioners and those supporting their position see their strongest support in *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914). Those, and other cases have already been analyzed by the Court of Appeals, by us, Respondents' Brief 27-30, and in the amicus curiae brief of the National Legal Aid and Defender Association.[15] Fairly read, they do not counter the arguments we advance.[16]

Here we merely reiterate that the issue of preliminary hearings prior to arrest is not presented. The provisional remedy of arrest, which is necessary to enable a court to assert its jurisdiction over a defendant for subsequent

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[15]We would add to the NLAD Brief by submitting that *Costello v. United States*, 350 U.S. 359 (1956) and *Lawn v. United States*, 355 U.S. 339 (1959) focus upon considerations much different from those presented here. Thus, their dicta, even though it does not bar our claim, is of limited value.

[16]If by some stretch of logic it could be said that those cases in any way determine the contemporary claims of this case, the adage "Law must govern life, and the very essence of life is change" is a thought worthy of consideration. Pound, *Criminal Justice in America* 36 (1930). So too is Justice Pitney's comment, responding to an argument that due process is immutable:

> "... to hold that such a characteristic [immutability] is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."
>
> *Hurtado v. California*, 110 U.S. 516, 529 (1884).

trial is unaffected by a subsequent judicial determination of probable cause. So *Ocampo's* comment that determining probable cause for "arrest" may be delegated to a quasi-judicial officer does not mean that the decision to arrest forecloses judicial review prior to trial.[17] Even a search warrant, issued by a judicial officer may be reviewed prior to trial in an adversary setting. Yet the Government would have us believe that liberty, taken by a prosecutor's *ex parte* information and the warrant that issues thereafter is beyond scrutiny until trial. No case supports that proposition.

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[17]The Government's misunderstanding of this distinction is apparent thoughout their brief. Thus they quote cases which are inapposite. For instance, *United States ex rel. Hughes v. Gault*, 271 U.S. at 149:

> "The Constitution does not require any preliminary hearing *before* a person charged with a crime against the United States *is brought* into the court having jurisdiction." (Emphasis supplied.)
>
> Government Brief 29-30, n. 25;

and *United States v. Bland*, 472 F. 2d at 1337:

> "We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing *before the prosecutor can exercise his ago-old function* of deciding what charge to bring against whom." (Emphasis supplied.)
>
> Government Brief 42, n. 36.

The error is perpetuated to the end of their Brief when they utilize *Calero-Toledo v. Pearson Yacht Leasing*, ___ U.S. ___, 94 S. Ct. 2080 (1974). The taking without a hearing in that case was necessary to assert jurisdiction over the boat before it was removed from the jurisdiction. We have no quarrel with that process as long as there is a chance for early subsequent review.

B. History.

The historic purpose of the preliminary hearing remains unchanged today:

> "The object or purpose of the preliminary [hearing] is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."
>
> *Thies v. State*, 178 Wis. 98, 189 N.W. 539, 541 (1922).

The emergence of public prosecutors in the United States did not render preliminary hearings superfluous. Every state provides for such hearings. Respondents' Brief, App. 1a - 2a. From the amicus curiae briefs filed in this case, it appears that they are both used and useful. While the prosecutor has "provided a new and professional medium of screening" as the Government submits, there is no reason to think he has supplanted preliminary hearings. His function is complemented by a preliminary hearing which permits an opportunity to be heard.

It would be ironic if the *ex parte* prosecutorial determination were now considered to obviate the impartial probable cause inquiry which gradually evolved in England, merely because the English inquiry preceded the formal charge. That would result in a step backwards and yet the Government argues for it: The

preliminary hearing is emptied of its normal and traditional purpose if it is held after the filing of . . . an information". Government Brief 28.

It appears that only a handful of states agree with that proposition. "In most jurisdictions an information may not be filed unless a judge is convinced that probable cause exists." Katz, *Justice is the Crime, Pretrial Delay in Felony Cases* 17 (1972) (footnote omitted). The caution is well founded:

> "Evidence exists from the reign of Edward I that the king, through his legal representatives, the sejeant of treason or the sejeant of felony (forerunners of the modern prosecutor) accused persons of felony or misdemeanor cases in the Court of The Star Chamber and thus avoided the grand jury."
>
> *Id*, Katz at 16:
>
> "The information procedure was eventually misused by Crown officials through malicious prosecutions. This abuse was remedied by the Statute of 4 Will. & Mary, c. 18 (A.D. 1692) which forced the Master of the Crown Office into a proceeding with a magistrate. 1 J. Stephen, *A History of the Criminal Law of England*, 294-97 (1883)."
>
> *Id* at 16-17, n. 34.

We imply no malice in present day prosecutors. But history does suggest that any secret, *ex-parte* determinations made by police and prosecutors which substantially affect a person's right to liberty, ought to be open to subsequent judicial review.

By asking that this Court clothe informations with sanctity until trial, the Government is seeking a radical

enlargement of prosecutorial powers throughout the United States. We submit that their arguments must be rejected.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

1a

A COMPARISON OF INTERESTS RELEVANT TO DUE PROCESS DETERMINATIONS

CASE	THE RIGHT INVOLVED	THE DEFENDANT'S CLAIM TO THE LIBERTY OR PROPERTY	THE HARM CAUSED TO DEFENDANT BY VIRTUE OF THE DEPRIVATION	THE OPPOSING PARTY'S INTEREST IN THE TAKING	WAS THERE JUDICIAL SUPERVISION OF TAKING UNDER ATTACKED STATUTORY SCHEMES?	IS THERE JUDICIAL SUPERVISION OF TAKING UNDER SUPREME COURT DECISION?	THE METHOD OF REGAINING LOST INTEREST FOR THOSE FINANCIALLY ABLE	PREREQUISITES FOR TAKING UNDER ATTACKED SCHEME	THE REMEDY FOR IMPROVIDENT TAKING	PRESENT PROCEDURES AVAILABLE TO PRELIMINARILY TEST THE VALIDITY OF THE TAKING	STATE'S OBJECTION TO PROVIDING PROMPT PRELIMINARY HEARINGS DEMANDED BY THE DEFENDANTS	IS ATTEMPTED DEPRIVATION BASED UPON UNDERLYING WRITTEN AGREEMENT?
Gerstein v. Pugh	Liberty	Absolute	Loss of Freedom; possible loss of job, reputation; possible physical or emotional injury in jail	To assert Jurisdiction for trial (continued physical custody not essential)	No	----	Bond, at discretion of judicial official	Arrest, filing of information (or information, arrest)	None	None	Economy and efficiency	No
Mitchell v. W.T. Grant	Property	Conditional	Loss of use of stereo, stove, refrigerator, washing machine	To recover property and protect against loss or depreciation pending trial	Yes	Yes	Absolute right to regain property through posting of bond.	Demand and bond	Action against bond; availability of attorneys fees and damages for injury to social standing reputation, humiliation and mortification.	Immediate post-deprivation adversarial hearing upon request	Economy, efficiency, protect creditors' rights to property	Yes, signed conditional sales contract
Fuentes v. Shevin	Property	Conditional	Loss of use of stereo and stove	To recover property and protect against loss or depreciation pending trial	No	Yes	Absolute right to regain property through posting of bond.	Demand and bond	Action against bond	Automatic prior hearing	Economy, efficiency, protect creditors' rights to property	Yes, signed conditional sales contract
Sniadach v. Family Finance Corporation	Property	Absolute	Loss of up to 50 percent of wages	To insure payment of alleged debt	No	Yes	None	Demand and bond	Action for return of money	Automatic prior hearing	?	Yes, signed promissory note
Morrissey v. Brewer	Liberty	Conditional	Loss of freedom; possible loss of job; possible physical or emotional injury in jail	To impose punishment upon convicted defendant	Initially, at sentencing, yes. Thereafter, no.	No, although a neutral and detached arbiter is required.	None	Adjudication, sentence, parole, rearrest	Habeas corpus	Automatic subsequent adversarial hearing after arrest	Economy, efficiency	Yes, parole agreement (not clear if signed)
Gagnon v. Scarpelli	Liberty	Conditional	Loss of freedom; possible loss of job; possible physical or emotional injury in jail	To impose punishment upon convicted defendant	Initially at sentencing, yes. Thereafter, no.	No, although a neutral and detached arbiter is required.	None	Adjudication, sentence, probation, rearrest	Habeas corpus	Automatic subsequent hearing after arrest (ability to cross-examine witnesses depends on geographical circumstances)	Economy, efficiency	Yes, signed probation agreement